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ABSTRACT

Hearings were held on 4 days to consider questions of fair use of unpublished materials, the renewal of copyrights, and national preservation of film materials pursuant to proposed amendments to federal legislation regarding copyrights included in House Bill 2372. Fair use provisions spell out some exceptions to statutorily defined rights of copyright holders. It is sometimes in the public interest to provide limited free use of protected materials, and the fair use of unpublished material has been of interest in recent court decisions. Whether legislation is needed to further define fair use is the subject of the first days of hearings. Also considered in this series of hearings are questions relating to amendments of copyright renewal conditions and terms, and the reauthorization of the National Film Registry of the Library of Congress. Proposed legislation would advance the goals of the 1988 legislation establishing the registry. Testimony from 23 witnesses was received in relation to these issues; and letters, statements, and the prepared testimony of the witnesses are included. Twenty-five appendixes provide supplemental information. The text of the bill precedes the hearing transcripts. (SLD)

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

H.R. 2372

COPYRIGHT AMENDMENTS ACT OF 1991
FAIR USE OF UNPUBLISHED WORKS, COPYRIGHT RENEWAL, AND NATIONAL FILM PRESERVATION

MAY 30, JUNE 6, 12, AND 20, 1991

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COPYRIGHT AMENDMENTS ACT OF 1991
(Fair Use of Unpublished Works)

THURSDAY, MAY 30, 1991

House of Representatives,
Subcommittee on Intellectual Property
and Judicial Administration,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2237, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Mike Synar, Dan Glickman, Barney Frank, George E. Sangmeister, Carlos J. Moorhead, Howard Coble, and F. James Sensenbrenner, Jr.

Also present: Hayden W. Gregory, counsel; Michael J. Remington, assistant counsel; Edward O'Connell, assistant counsel; Phyllis Henderson, staff assistant; and Joseph V. Wolfe, minority counsel.

OPENING STATEMENT OF CHAIRMAN HUGHES

Mr. Hughes. The Subcommittee on Intellectual Property and Judicial Administration will come to order.

Today we are conducting our first hearing on title I of H.R. 2372, the Copyright Amendments Act of 1991.

[The bill, H.R. 2372, follows:]

I

102D CONGRESS
1ST SESSION

H. R. 2372

To amend title 17, United States Code, with respect to fair use and copyright renewal, to reauthorize the National Film Registry Board, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 16, 1991

Mr. HUGHES (for himself and Mr. MOORHEAD) introduced the following bill; which was referred jointly to the Committees on the Judiciary and House Administration

---

A BILL

To amend title 17, United States Code, with respect to fair use and copyright renewal, to reauthorize the National Film Registry Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Amendments Act of 1991".

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TITLE I—FAIR USE

SECTION 101. FAIR USE REGARDING UNPUBLISHED WORKS.

Section 107 of title 17, United States Code, is amended by adding at the end the following: "The fact that a work is unpublished is an important element which tends to weigh against a finding of fair use, but shall not diminish the importance traditionally accorded to any other consideration under this section, and shall not bar a finding of fair use if such finding is made upon full consideration of all the factors set forth in paragraphs (1) through (4).".

TITLE II—RENEWAL OF COPYRIGHT

SEC. 201. SHORT TITLE.

This title may be referred to as the "Copyright Renewal Act of 1991".

SEC. 202. COPYRIGHT RENEWAL PROVISIONS.

(a) DURATION OF COPYRIGHT: SUBSISTING COPYRIGHTS.—Section 304(a) of title 17, United States Code, is amended to read as follows:

"(a) COPYRIGHTS IN THEIR FIRST TERM ON JANUARY 1, 1978.—(1)(A) Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

"(B) In the case of—

"(i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or

"(ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire,

the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 47 years.

"(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work—

"(i) the author of such work, if the author is still living,

"(ii) the widow, widower, or children of the author, if the author is not living,

"(iii) the author's executors, if such author, widow, widower, or children are not living, or

"(iv) the author's next of kin, in the absence of a will of the author,

shall be entitled to a renewal and extension of the copyright in such work for a further term of 47 years.

"(2)(A) At the expiration of the original term of copyright in a work specified in paragraph (1)(B) of this subsection, the copyright shall endure for a renewed and extended further term of 47 years, which—

"(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in the proprietor of the copyright who is entitled to claim the renewal of copyright at the time the application is made; or

"(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in the person or entity that was the proprietor of the copyright as of the last day of the original term of copyright.

"(B) At the expiration of the original term of copyright in a work specified in paragraph (1)(C) of this subsection, the copyright shall endure for a renewed and extended further term of 47 years, which—

"(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in any person who is entitled under paragraph (1)(C) to the renewal and extension of the copyright at the time the application is made; or

"(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to the renewal and extension of the copyright.

"(3)(A) An application to register a claim to the renewed and extended term of copyright in a work may be made to the Copyright Office—

"(i) within 1 year before the expiration of the original term of copyright by any person entitled under paragraph (1)(B) or (C) to such further term of 47 years; and

"(ii) at any time during the renewed and extended term by any person in whom such further term vested, under paragraph (2)(A) or (B), or by any successor or assign of such person, if the application is made in the name of such person.

"(B) Such an application is not a condition of the renewal and extension of the copyright in a work for a further term of 47 years.

"(4)(A) If an application to register a claim to the renewed and extended term of copyright in a work is not made within 1 year before the expiration of the original term of copyright in a work, or if the claim pursuant to such application is not registered, then a derivative work prepared under authority of a grant of a transfer or license of copyright that is made before the expiration of the original term of copyright, may continue to be used under the terms of the grant during the renewed and extended term of copyright without infringing the copyright, except that such use does not extend to the preparation during such renewed and extended term of other derivative works based upon the copyrighted work covered by such grant.

"(B) If an application to register a claim to the renewed and extended term of copyright in a work is made within 1 year before its expiration, and the claim is registered, the certificate of such registration shall constitute prima facie evidence as to the validity of the copyright during its renewed and extended term and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration of a renewed and extended term of copyright made after the end of that 1-year period shall be within the discretion of the court.".

(b) LEGAL EFFECT OF RENEWAL OF COPYRIGHT IS UNCHANGED.—The renewal and extension of a copyright for a further term of 47 years as provided under paragraphs (1) and (2) of section 304(a) of title 17, United States Code, (as amended by subsection (a) of this section) shall have the same effect with respect to any grant, before the effective date of this section, of a transfer or license of the further term as did the renewal of a copyright before the effective date of this section under the law in effect at the time of such grant.

(c) CONFORMING AMENDMENT.—Section 304(c) of title 17, United States Code, is amended in the matter preceding paragraph (1) by striking "second proviso of subsection (a)" and inserting "subsection (a)(1)(C)".

(d) REGISTRATION PERMISSIVE.—Section 408(a) of title 17, United States Code, is amended by striking "At" and all that follows through "unpublished work," and inserting "At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date,".

(e) FALSE REPRESENTATION.—Section 506(e) of title 17, United States Code, is amended by inserting after "409," the following: "in the application for a renewal registration,".

(f) COPYRIGHT OFFICE FEES.—Section 708(a)(2) of title 17, United States Code, is amended—

(1) by striking "in its first term"; and

(2) by striking "$12" and inserting "$20".

(g) EFFECTIVE DATE; COPYRIGHTS AFFECTED BY AMENDMENT.—(1) Subject to paragraphs (2) and (3), this section and the amendments made by this section shall take effect on the date of the enactment of this Act.

(2) The amendments made by this section shall apply only to those copyrights secured between January 1, 1963, and December 31, 1977. Copyrights secured before January 1, 1963, shall be governed by the provisions of section 304(a) of title 17, United States Code, as in effect on the day before the effective date of this section.

(3) This section and the amendments made by this section shall not affect any court proceedings pending on the effective date of this section.

TITLE III—NATIONAL FILM PRESERVATION

SEC. 301. SHORT TITLE.

This title may be cited as the "National Film Preservation Act of 1991".

SEC. 302. FINDINGS.

The Congress finds that—

(1) motion pictures are an indigenous American art form that has been emulated throughout the world;

(2) certain motion pictures represent an enduring part of our Nation's historical and cultural heritage;

(3) less than half of the feature-length films produced in the United States before 1951, including only 20 percent of the silent films, still exist today because of deterioration or loss, and many of the films produced after 1951 are deteriorating at an alarming rate;

(4) it is appropriate and necessary for the Federal Government to recognize motion pictures as a significant American art form deserving of protection, including preservation and restoration, and to establish a registry of films that represent an enduring part of the national, historical, and cultural her-

itage of the United States, and this registry should be established and maintained by the Library of Congress; and

(5) to the extent possible, and with the permission of the copyright owners, films on this film registry should be made widely available to the American public in their original form.

SEC. 303. NATIONAL FILM REGISTRY OF THE LIBRARY OF CONGRESS.

The Librarian of Congress (hereinafter in this title referred to as the "Librarian") shall establish a National Film Registry pursuant to the provisions of this title, for the purpose of registering films that are culturally, historically, or aesthetically significant.

SEC. 304. DUTIES OF THE LIBRARIAN OF CONGRESS.

(a) POWERS.—(1) The Librarian shall, after consultation with the Board established pursuant to section 305, do the following:

(A) After completion of the study required by section 314, the Librarian shall, taking into account the results of the study, establish a comprehensive national film preservation program for motion pictures, in conjunction with other major film archives. The objectives of such a program shall include—

(i) coordinating activities to assure that efforts of archivists and copyright owners, and others in the public and private sector are effective and complementary;

(ii) generating public awareness of and support for those activities;

(iii) increasing accessibility of films for educational purposes, and improving nationwide activities in the preservation of works in other media such as videotape.

(B) The Librarian shall establish criteria and procedures under which films may be included in the National Film Registry, except that no film shall be eligible for inclusion in the National Film Registry until 10 years after such film's first publication.

(C) The Librarian shall establish procedures under which the general public may make recommendations to the Board regarding the inclusion of films in the National Film Registry.

(D) The Librarian shall establish procedures for the examination by the Librarian of copies of films named for inclusion in the National Film Registry to determine their eligibility for the use of the seal of the National Film Registry under paragraph (2)(C).

(2) In addition to the Librarian's duties under paragraph (1), the Librarian shall do the following:

(A) The Librarian shall determine, after consultation with the Board, which films satisfy the criteria developed under paragraph (1)(B) and qualify for inclusion in the National Film Registry, except that the Librarian shall not select more than 25 films each year for inclusion in the Registry.

(B) The Librarian shall publish in the Federal Register the name of each film that is selected for inclusion in the National Film Registry.

(C) The Librarian shall provide a seal to indicate that a film has been included in the National Film Registry as an enduring part of the national cultural heritage of the United States. Such seal may then be used on copies of such films that are original and complete versions as they were first published, after such copies have been examined and approved by the Librarian. In the case of copyrighted works, only the copyright owner, a duly authorized licensee, or the Librarian or an archive other than the Library of Congress may place a seal on a copy of a film selected for inclusion in the National Film Registry. Wherever appropriate, the Librarian may accompany the seal with language indicating that a copy of a film was preserved and restored by the Librarian or by an archive acting under the standards issued under subparagraph (D).

(D) The Librarian shall publish in the Federal Register the standards for preservation or restoration that will qualify films for use of the seal under subparagraph (C).

(3) The Librarian shall submit to the Congress a report, not less than once every two years, listing films included in the National Film Registry and describing the activities of the Board.

SEC. 305. NATIONAL FILM PRESERVATION BOARD.

(a) Number and Appointment.—(1) The Librarian shall establish in the Library of Congress a National Film Preservation Board to be comprised of up to 17 members, who shall be selected by the Librarian in accordance with the provisions of this section. Subject to subparagraphs (C) and (O), the Librarian shall request each organization listed in subparagraphs (A) through (P) to submit to the Librarian a list of not less than 3 candidates qualified to serve as a member of the Board. Except for the member-at-large appointed under paragraph (2), the Librarian shall appoint one member from each such list submitted by such organizations, and shall designate from that list an alternate who may attend those meetings to which the individual appointed to the Board cannot attend. The organizations are the following:

(A) The Academy of Motion Pictures Arts and Sciences.

(B) The Directors Guild of America.

(C) The Writers Guild of America. The Writers Guild of America East and the Writers Guild of America West shall each nominate 3 candidates, and a representative from one such organization shall be selected as the member and a representative from the other such organization as the alternate.

(D) The National Society of Film Critics.

(E) The Society for Cinema Studies.

(F) The American Film Institute.

(G) The Department of Theatre, Film and Television of the College of Fine Arts at the University of California, Los Angeles.

(H) The Department of Film and Television of the Tisch School of the Arts at New York University.

(I) The University Film and Video Association.

(J) The Motion Picture Association of America.

(K) The National Association of Broadcasters.

(L) The Alliance of Motion Picture and Television Producers.

(M) The Screen Actors Guild of America.

(N) The National Association of Theater Owners.

(O) The American Society of Cinematographers and the International Photographers Guild. Each such organization shall nominate 3 candidates, and a representative of one such organization shall be selected as a member, and a representative of the other such organization shall be selected as an alternate.

(P) The United States members of the International Federation of Film Archives.

(2) In addition to the Members appointed under paragraph (1), the Librarian shall appoint the member-at-large. The Librarian shall select the at-large member from names submitted by organizations in the film industry, creative artists, producers, film critics, film preservation organizations, academic institutions with the film study programs, and others with knowledge of copyright law and of the importance, use, and dissemination of films. The Librarian shall also select from the names submitted under this paragraph an alternate member-at-large who may attend those meetings to which the member-at-large cannot attend.

(b) CHAIRPERSON.—The Librarian shall appoint one member of the Board to serve as Chairperson.

(c) TERM OF OFFICE.—(1) The term of each member of the Board shall be 3 years, except that there shall be no limit to the number of terms that any individual member may serve.

(2) A vacancy in the Board shall be filled in the manner prescribed by the Librarian, except that no entity listed in subsection (a) may have more than one nominee on the Board at any time. Any member appointed to fill a vacancy before the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term.

(d) QUORUM.—Nine members of the Board shall constitute a quorum but a lesser number may hold hearings.

(e) BASIC PAY.—Members of the Board shall serve without pay. While away from their home or regular places of business in the performance of functions of the Board, members of the Board shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed expenses under section 5701 of title 5, United States Code.

(f) MEETINGS.—The Board shall meet at least once each calendar year. Meetings shall be at the call of the Librarian.

(g) CONFLICT OF INTEREST.—The Librarian shall establish rules and procedures to address any potential conflict of interest between a member of the Board and the responsibilities of the Board.

SEC. 306. RESPONSIBILITIES AND POWERS OF BOARD.

(a) IN GENERAL.—The Board shall review nominations of films submitted to it for inclusion in the National Film Registry and shall consult with the Librarian, as provided in section 304, with respect to the inclusion of such films in the Registry and the preservation of these and other films that are culturally, historically, or aesthetically significant.

(b) NOMINATION OF FILMS.—The Board shall consider, for inclusion in the National Film Registry, nominations submitted by the general public as well as representatives of the film industry, such as the guilds and societies representing actors, directors, screenwriters, cinematographers and other creative artists, producers, film critics, film preservation organizations, and representatives of academic institutions with film study programs. The Board shall nominate not more than 25 films each year for inclusion in the Registry.

(e) GENERAL POWERS.—The Board may, for the purpose of carrying out its duties, hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Librarian and the Board considers appropriate.

SEC. 307. NATIONAL FILM REGISTRY COLLECTION OF THE LIBRARY OF CONGRESS.

(a) ACQUISITION OF ARCHIVAL QUALITY COPIES.—The Librarian shall endeavor to obtain, by gift from the owner, an archival quality copy of an original version of each film included in the National Film Registry. Wherever possible, the Librarian shall endeavor to obtain the best surviving materials, including preprint materials.

(b) ADDITIONAL MATERIALS.—The Librarian shall endeavor to obtain, for educational and research purposes, additional materials related to each film included in the National Film Registry, such as background materials, production reports, shooting scripts (including continuity scripts) and other similar materials.

(c) PROPERTY OF UNITED STATES.—All copies of films on the National Film Registry that are received by the Librarian and other materials received by the Librarian under subsection (b) shall become the property of the United States Government, except that nothing in this subsection shall affect the rights of owners of copyright under title 17, United States Code.

(d) NATIONAL FILM REGISTRY COLLECTION.—All copies of films on the National Film Registry that are received by the Librarian and all materials received by the Librarian under subsection (b) shall be maintained in a special collection in the Library of Congress to be known as the "National Film Registry Collection of the Library of Congress". The Librarian shall, by regulation, and in accordance with title 17, United States Code, provide for reasonable access to films in such collection for scholarly and research purposes.

SEC. 308. SEAL OF THE NATIONAL FILM REGISTRY.

(a) USE OF THE SEAL.—No person shall knowingly distribute or exhibit to the public a version of a film which bears a seal described in section 304(a)(2)(C) if such film—

(1) is not included in the National Film Registry; or

(2) is included in the National Film Registry, but such copy was not examined and approved for the use of the seal by the Librarian under section 304(a)(2)(C).

(b) EFFECTIVE DATE OF THE SEAL.—The use of the seal described in section 304(a)(2)(C) shall be effective for each film after the Librarian publishes in the Federal Register the name of that film as selected for inclusion in the National Film Registry.

SEC. 309. REMEDIES.

(a) JURISDICTION AND STANDING.—The several district courts of the United States shall have jurisdiction, for cause shown, to prevent and restrain violations of section 8(a) upon the application of the Librarian to the Attorney General of the United States.

(b) RELIEF.—(1) Except as provided in paragraph (2), relief for a violation of section 308(a) shall be limited to the removal of the seal of the National Film Registry from the film involved in the violation.

(2) In the case in which the Librarian finds a pattern or practice of the willful violation of section 308(a), the United States district courts may order a civil fine of not more than $10,000 and appropriate injunctive relief.

SEC. 310. LIMITATIONS OF REMEDIES.

The remedies provided in section 309 shall be the exclusive remedies under this Act, or any other Federal or State law, regarding the use of the seal described in section 304(a)(2)(C).

SEC. 311. STAFF OF BOARD; EXPERTS AND CONSULTANTS.

(a) STAFF.—The Librarian may appoint and fix the pay of such personnel as the Librarian considers appropriate.

(b) EXPERTS AND CONSULTANTS.—The Librarian may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the maximum rate of basic pay payable for GS-15 of the General Schedule. In no case may a member of the Board be paid as an expert or consultant under such section.

SEC. 312. DEFINITIONS.

As used in this Act—

(1) The term "Librarian" means the Librarian of Congress.

(2) The term "Board" means the National Film Preservation Board.

(3) The term "film" means a "motion picture" as defined in section 101 of title 17, United States Code, except that such term does not include any work not originally fixed on film stock, such as a work fixed on videotape or laser disks.

(4) The term "publication" means "publication" as defined in section 101 of title 17, United States Code.

(5) The term "original and complete" means, with respect to a film, the version of the film first published, or as complete a version as the bona fide preservation and restoration activities by the Librarian or an archive acting pursuant to section 304(a)(2)(D) can compile in those cases where the original material has been irretrievably lost.

SEC. 313. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Librarian such sums as may be necessary to carry out the purposes of this Act.

SEC. 314. STUDY BY THE LIBRARIAN.

(a) STUDY.—The Librarian, after consultation with the Board, shall conduct a study on the current state of film preservation and restoration activities, including the activities of the Library of Congress and the other major film archives in the United States. The Librarian shall, in conducting the study, consult with film archivists, educators and historians, copyright owners, film industry representatives, including those involved in the preservation of film, and others involved in activities related to film preservation.

(b) REPORT.—Not later than 1 year after the date of the enactment of this Act, the Librarian shall submit to the Congress a report containing the results of the study conducted under subsection (a).

SEC. 315. EFFECTIVE DATE.

The provisions of this Act shall be effective until September 30, 1997. The provisions of this Act shall apply to any copy of any film, including those copies of films selected for inclusion in the National Film Registry under the National Film Preservation Act of 1988, except that any film so selected under such Act shall be deemed to have been selected for the National Film Registry under this Act.

SEC. 316. REPEAL.

The National Film Preservation Act of 1988 (2 U.S.C. 178 and following) is repealed.

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Mr. HUGHES. Title I addresses a very important element of copyright law of the United States, the fair use privilege. Under our law, copyright holders are entitled to certain statutorily delineated exclusive rights. These include rights of reproduction, distribution, performance, and preparation of derivative works.

In their totality, these broad exclusive rights constitute the portfolio of proprietary rights which our law grants to holders of copyright.

These exclusive rights are spelled out in section 106 of title 17, the copyright title of the U.S. Code. Section 106 is followed by 14 sections which consist of exceptions to these exclusive rights.

Thirteen of these sections spell out specific narrow exceptions to the general rule of exclusive rights. They relate to matters such as library photocopying, making of backup copies of computer programs, rights of lawful owners of individual copies of copyrighted material to sell those copies, and compulsory licensing for cable television and for juke box operators.

One section—section 107, which is the subject of the legislation before us—is a broad generic exception, under which limited "fair use" of copyrighted works is permitted without approval or payment to the copyright holder.

Section 107 differs from the other exceptions not only in its scope, but also in that it is a judicially created exception. The others are all creatures of statute. Though now embodied in the 1976 Copyright Revision Act, fair use continues to be a judicially administered doctrine, as you know.

It is important to keep these facts in mind as we consider amendments to the fair use exception. Almost 200 years of English and American common law were given statutory expression a short 15 years ago. At that time, our purpose was not to reform the law, but to restate it. We should not hastily disrupt that stability.

The fair use exception is driven by the same principle which forms the basis of the exclusive rights to which it is an exception: the promotion of the public interest.

Just as it is in the public interest to encourage creation by offering economic incentives to authors and inventors, it is also in the public interest to permit limited free use of protected material. Our law gives examples of purposes for which exceptions might be made—"criticism, comment, news reporting, teaching, scholarship, or research." It then sets out four factors which courts have developed to assess fair use claims raised in defense of infringement charges.

One of those factors is "the nature of the copyrighted work." One consideration in evaluating the nature of the work is whether the copyrighted work is published or unpublished. Examples of unpublished works include works intended for publication, but not yet published, as well as works which the author has not yet, and may never, choose to publish. Personal letters are frequently in that category.

The treatment of unpublished works has been a prominent feature in recent court decisions involving biographies of writer J.D. Salinger and L. Ron Hubbard, founder of the Church of Scientology.

These decisions have reportedly had a tremendously chilling effect on the willingness of publishers and producers to distribute works which utilize unpublished works as source material. The litigation known as the *New Era* case, which involved an unauthorized biography of L. Ron Hubbard, has caused the most problems.

Unpublished works have traditionally been less susceptible to fair use claims. However, language in the *New Era* case is being interpreted to constitute a virtual per se rule, under which no fair use would be permitted.

As a result of the shock waves that these legal developments have sent through the publishing community, biographies which quote from letters and diaries of famous persons have been suppressed or forced to undergo major rewrite when those persons or their heirs refuse to grant permission to use such material. News reporting and critical analysis of historical and contemporary events, in both print and broadcast media, are in similar turmoil over what material may and may not be used, and how it may be used.

After reading these cases, I understood why lawyers are advising their clients that reliance on the fair use defense has become very risky in these circumstances. It is made particularly risky because these same decisions which weaken, if not eliminate, the fair use defense also seem to strengthen the sanctions imposed when a publisher makes the wrong fair use call. I refer in particular to the suggestion in these cases that not only monetary damages, but injunctive relief is more or less automatic.

This is not the first time that the Congress has been called upon to legislatively repudiate court decisions interpreting public policy enunciated in earlier congressional enactments.

In fact, it occurs with sufficient frequency that this committee has developed its own informal guidelines on such legislation.

Frankly, some of these guidelines have not been met in the present circumstance. Most significantly, the situation does not involve a definitive ruling of the Supreme Court which is in conflict with congressional policy. Nor do we have a "split in the circuits," a phenomenon which is ordinarily a stepping stone to a ruling of the Supreme Court—not to congressional intervention to resolve the conflict in the circuits.

Nevertheless, I am convinced that the situation calls for careful congressional examination to determine if legislative clarification is needed.

First, the court decisions negatively impact on fundamental interests historically recognized in fair use analysis—serious works of scholarship, criticism, teaching, and news reporting. To the extent they appear to enunciate a per se rule against any fair use of unpublished works, they ipso facto depart from the multiple factor case-by-case analysis long recognized by courts and endorsed by the Congress in the 1976 codification.

Second, the absence of a split of the circuits may be due in large part to concentration of the print and electronic publishing industries in the second circuit. Plaintiffs choose the venue, and can be expected to gravitate toward the second circuit and its favorable law.

Third, if an early end to the legal turmoil and economic disruption is readily available and widely accepted, it may be in the public interest to move toward that solution.

In this regard, I want to point out that the legislative proposal before us is one that has been recommended by parties in interest who, in the last Congress, were unable to agree on a solution.

It remains the responsibility of the Congress to make the final decision on whether amendment is necessary and the form that it should take, nonetheless, agreement by formerly disagreeing major parties in interest is a positive development, one that, in this situation, deserves our serious consideration.

I now recognize the ranking Republican member, the gentleman from California, for any opening remarks that he may have.

Mr. MOORHEAD. Thank you, Mr. Chairman. You have done an outstanding job in outlining the fair use issue and the difficulties that historians, researchers, biographers, and others have had with that particular problem.

Last year when Senator Paul Simon and Congressman Kastenmeier introduced legislation, I was not a cosponsor of it, but I have been carefully monitoring the situation ever since. When the 102d Congress commenced, we waited for the results of the negotiations between interested parties to see if an appropriate legislative solution could be proposed.

I was pleased when the parties announced they had reached such an agreement, and I commend you, Mr. Chairman, for devoting 2 days of hearings to this important issue in such a timely fashion. This will allow the subcommittee to carefully review the compromise language embodied in H.R. 2372 to ensure it strikes the proper balance between historians, biographers, and others who want to further the important goals of the first amendment of the copyright laws when they use unpublished works in the legitimate interests of authors that control the first publication of their work. I appreciate the difficulties of drafting legislation in this area.

I would like to commend the various parties in their efforts in arriving at the current language. I look forward to their testimony today, Mr. Chairman.

Mr. HUGHES. Thank you.

The gentleman from Oklahoma.

Mr. SYNAR. Thank you, Mr. Chairman. I want to commend you for the expedited review you are giving this. I think that is important. I want to commend the parties that have previously not been able to agree and finally have come to agreement. I hope that we will review what they have to tell us, and hopefully, we can move and make whatever adjustments are necessary.

I think this is a very important issue which sometimes has been overlooked.

Mr. HUGHES. Thank you.

Any other members?

Let me introduce the first panel: Mr. Floyd Abrams, Ms. Kati Marton, Mr. Mark Morril, and Mr. Kenneth Vittor. Mr. Floyd Abrams is an attorney with the law firm of Cahill Gordon & Reindel in New York City, and is testifying on behalf of the Authors Guild. He is a graduate of Yale Law School and has had a distinguished career in the private practice of law and a distinguished teaching career at the same time. He has also published numerous articles.

Our second panelist is Ms. Kati Marton, who is an author and journalist. She lived in and reported from the Far East in a career spanning nearly two decades. Her latest book was published in September 1990, and the film version is now under production.

Our third panelist is Mr. Mark Morril, senior vice president and general counsel for Simon & Schuster. He is testifying on behalf of the Association of American Publishers. He is a graduate of Columbia Law School. He worked as a staff attorney in a public interest law firm and was in private practice in New York City most recently with Kay Collyer & Boose.

Our final panelist is Mr. Kenneth Vittor, vice president and associate general counsel, McGraw-Hill, Inc., testifying on behalf of the Magazine Publishers of America. He is a graduate of the University of Chicago Law School and is the author of an article entitled "Fair Use of Unpublished Materials: 'Widow Censors', Copyright and the First Amendment'" which was published in the fall of 1989 in the American Bar Association's Communications Lawyer.

We welcome the panelists today. If you will come forward and take your seats, we have your statements which we have all read. They are excellent; they are extensive, and without objection, I am going to make them a part of the record, in full. I am going to ask you to summarize for us. You will have a few minutes to think in terms of how you will summarize, but we will try to hold the statements to 5 minutes, because we have two panels, we have a lot of questions, and we will have perhaps a number of members here to ask questions.

With that, I am going to recess for 10 minutes to catch our vote, and come back and take your testimony. The subcommittee stands in recess.

[Recess.]

Mr. Hughes. The subcommittee will come to order.

Mr. Abrams, welcome.

STATEMENT OF FLOYD ABRAMS, ESQ., CAHILL GORDON & REINDEL, ON BEHALF OF THE AUTHORS GUILD

Mr. Abrams. Thank you, Mr. Chairman. Thanks very much for the opportunity to appear here today. Thanks very much for scheduling these hearings so very promptly. I do want to thank you and Representative Moorhead for introducing H.R. 2372, which I appear here this morning to testify in favor of on behalf of the Authors Guild.

The Authors Guild is a major national society of professional authors in this country. It has over 6500 members, and one of the things it does that is most important is to represent the views of its members in situations such as this in which they are so adversely impacted by the current state of the law.

Many of us in this room, Mr. Chairman, have worked very hard for good parts of the last year in trying to resolve the differences that divided us from individuals and industries that opposed legislation last year. We have now, as you have said, come up with our proposed compromise, and it now falls to you to decide what to do with that.

What we were trying to do was to solve a problem, and to put it as plainly as I can and maybe focusing a little too much on my own role as a practicing lawyer, the problem is this: A lawyer such as myself, that represents newspapers, publishers, authors, and the like, when confronted with a historian or biographer or journalist who wanted to quote from any letter, any diary, any memorandum not previously published, had to tell him or her "either you can't do that or, if you do that, you will run enormous legal risks." That comes about as a result of these two second circuit cases that you referred to earlier.

We think the solution that we offer you is extremely modest in scope. It does not allow wholesale quotations from unpublished works, but only quotations in such limited amount as historically have been deemed, quote, fair, unquote. It does not equate quotations from unpublished works with quotations from published works, providing instead that the fact that a work is unpublished is an important factor tending to weigh against a finding of fair use, but only that, only tending to weigh against a finding of fair use—not determining in and of itself that a use is unfair, not precluding the courts from looking at all four factors set forth in section 107, as the courts determine whether a use is fair or unfair.

In fact, it would leave open to a judge in a particular case to find that the unpublished nature of a particular work—a hidden presidential letter, a diary entry of a prominent subject of a diary—may tend to weigh in favor of fair use. But as a general matter, it will weigh against it.

The *Salinger* and *New Era* cases of the second circuit have gone very far indeed toward sending a message that no lawyer can avoid and no author cannot but therefore be adversely affected by. The reading, if I may presume to speak for the bar, that we have given these cases is not particularly risk adverse. It is not born out of timidity; it is not born out of an effort always to avoid any potential risk for our clients. We know we cannot do that. It comes directly from the language of the rulings of the second circuit and the interpretation the second circuit has given to the *Harper & Row* case of the Supreme Court.

The language of the Circuit is worth repeating. In the *Salinger* case, the second circuit said that unpublished works "normally enjoy complete protection against copying." The question is, do we really want that to be the law, complete protection, normally, in all cases, every single word, not the slightest quotation?

In *New Era*, referring back to *Salinger*, the Court said that even "a small... body of unpublished material cannot pass the fair use test, given the strong presumption against fair use of unpublished works." With language such as this from the circuit, in which, as you rightly pointed out, most of the publishing, broadcasting, magazine industries of this country are centered, we have no choice as lawyers but to tell our clients that either they can't publish things that they historically have understood they could publish, or if they do publish it, they publish at their peril.

One of the main reasons for this is that the court has so overread, in our view, the *Harper & Row* decision as to make the unpublished character of a work in and of itself determinative, not just as to one of the four fair use factors, but as to all of them. And, in particular, they have moved with extraordinary rapidity from saying that the fact that a work is unpublished affects or governs in some cases factor two, to having it therefore govern on factor four, the issue of whether the publication interferes with the marketability of the initial author's work.

All we want to do is to permit the courts, to encourage the courts, to tell the courts that they have to consider all four fair use factors, that the unpublished nature of a work is not a trump card to be played which ends all consideration of the equities in the case and of how the balance should be struck amongst all four fair use factors. The language of the second circuit is not some stray dictum which found its way into those opinions; they are at the heart of those opinions.

Finally, Mr. Chairman, I would just add that there has been some criticism on occasion, and last year I recalled it when I testified, to any legislation on the grounds it might interfere with the right of privacy. We have privacy laws. States have privacy laws to the extent they are needed and are constitutional. The States are perfectly free to enact laws designed to protect people's privacy.

It has also been said that this bill would interfere with the right of first publication. Fair use always interferes by its nature with the monopoly right that the Copyright Act gives to authors, but there is nothing in the law now, on its face, which says there is no fair use with respect to first publication. In fact, a plain reading of the law would lead to quite the opposite conclusion.

I say in conclusion, Mr. Chairman, that this is a narrow and focused compromise which we offer to you. We think it deals with the problem which brings us here today, and we urge you to adopt it.

Thank you very much.

Mr. HUGHES. Thank you very much.

[The prepared statement of Mr. Abrams follows:]

Prepared Statement of Floyd Abrams, Esq., Cahill Gordon & Reindel, on Behalf of the Authors Guild

Mr. Chairman and distinguished members of this Committee: at your invitation, I appear today on behalf of the Authors Guild, Inc. to testify in support of H.R. 2372, legislation designed to assure that well-established principles of fair use set forth in the Copyright Act are not abandoned in all cases in which quotations are made from letters, diaries and other unpublished works. The Authors Guild is the major national society of professional authors, representing more than 6,500 members throughout the nation. One of the Guild's principal purposes is to express its members' views in cases involving fundamental questions of both freedom of expression and copyright law.

The legislation in question is modest in scope. It would not allow wholesale quotations from unpublished works but only the limited amount historically deemed "fair" under the Act. It would not equate quotations from unpublished works with those from published works, providing instead that the unpublished nature of the quoted from work was an important factor tending to weigh against a finding of fair use. But it is that and no more. Sometimes the unpublished nature of work -- a hidden Presidential letter, a diary entry of a prominent subject of a biography -- will tend to weigh in favor of fair use. And always fair use will be determined not alone on the basis of its unpublished nature, but on the basis of due consideration being given to all four fair use factors set forth in Section 107 of the Copyright Act without ignoring the importance traditionally afforded to those other factors.

Let me say one thing that should be obvious at the outset: the Authors Guild and all authors well understand that the Copyright Act exists to protect them. In fact, the proper application of the Copyright Law assists authors -- and ultimately the public -- by protecting creative works from unauthorized copying and by giving authors an economic incentive to create those works. Properly enforced, then, the Copyright Law serves the interests of authors and readers alike.

However, in two cases decided by the Court of Appeals for the Second Circuit in recent years, Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987) ("Salinger") and New Era Publications International v. Henry Holt & Co., ("Hubbard"), 873 F.2d 576 (2d Cir. 1989) rehearing denied, 884 F.2d 659 (2d Cir. 1989), cert. denied, 110 S. Ct. 1168 (1990), it has been suggested that the fair use doctrine has such limited application when unpublished source material (such as letters, diaries or journals) is quoted from that the doctrine is all but irrelevant in those cases.

These decisions have had an intensely practical effect: as a direct result of them, historians, biographers and journalists are now being told by lawyers -- not unlike me -- that they either may not quote at all from unpublished writings or that their quotations must be so limited in scope as to make it impossible to convey the tone and flavor of the individuals they are writing about. Such legal advice is not simply the efforts of risk-averse lawyers to avoid any possibility of liability for their clients; it is based upon a reading of recent judicial rulings which is not only plausible but unavoidable. The journalist who wishes to quote from a previously unpublished memorandum of a formerly high-ranking official does so at his peril and that of his newspaper; the biographer who wishes to quote from letters of his subject may not do so unless the subject approves (an unlikely event with respect to any critical biography) or if the biographer and his publisher are willing to risk the soaring costs of litigation.

In testimony on this topic last year, Taylor Branch, author of the Pulitzer Prize winning biography of Martin Luther King entitled "Parting the Waters," illustrated his need to quote from unpublished materials and his concerns about recent legal developments this way:

"History is written by weaving together the varied historical sources which a writer can find; quoting or paraphrasing at modest length from the rich ore of available historical sources (regardless of whether they are published, or disseminated, or unpublished) has always been an essential tool for providing intimacy, immediacy, and ambience -- *i.e.*, the truth. Such quotations are indispensable to enabling readers fully to imagine and to understand long-ago events.

"Dry facts can generally be mined from sources without quoting or paraphrasing, but the harder challenge of vividly recreating a period, of animating historical figures, high and low, so that their passions and struggles and motives come alive, can hardly be met without some direct reliance on the revealing words and phrases and metaphors used by history's participants. Unfortunately, the telling phrases that have no substitutes are not always neatly segregated into published secondary works or collections of sources. More often, they are found in local historical society archives, in the records of community or public interest groups like local NAACP chapters, or in documents lying in libraries or archives or government files.

"My work convinces me ever more strongly that unpublished material provides far more than a garnish or decoration for historical studies. Such 'hidden' materials are essential to the heart of the story itself, especially in what I have come to call cross-cultural narrative -- the perceived and unperceived interaction of isolated racial, social, or professional cultures. It shocked me to discovery that Dr. King -- far from being the comfortable choice of most of his fellow black Baptist preachers -- was almost literally excommunicated from the national convention in which his father and grandfather had established the power of the King family. This expulsion was a major blow to King personally, and a major turning point in his career, and yet not a word of the event appeared in the standard published sources, then or later. The world of black preachers was invisible to the dominant culture, and therefore even the fame of Dr. King could not put this crisis on the historical record. To convey the feel of the church controversy, I quoted a letter from Wyatt Walker: 'The smoke has cleared, and evil is once more strongly entrenched upon the throne.' Under the *New Era* ruling, it would have been dangerous to use the quotation and perhaps impossible to reconstruct the episode itself.

"The entire first chapter of *Parting the Waters*, about the background of King's church world as seen through the life of Dr. Vernon Johns, was based on unpublished materials. This was because Johns remained -- unjustly, I believe -- an invisible person in the published references. Nearly the whole texture of black history was lost for that period, and required unpublished materials as a starting point. To convey the sense of the relationship between Dr. King and Malcolm X, I quoted only the first three words from the brush-off letter Dr. King instructed his secretary to write: 'Dr. Mr. X.' To convey one point about the breadth of religious discussion in King's student years, I quoted the pompous letter of a preacher concerning the eminent theologian Paul Tillich (about whom King wrote his Ph.D. dissertation): 'Tillich is all wet . . . . There is no "being itself."'

"In my work experience, such blind spots in the published record extended far beyond Dr. King's life. To recreate the origins of the Mississippi voting rights project, which led five years later to the 1965 Voting Rights Act, I quoted the 1960 reply of a young volunteer to Bob Moses, then a new student leader: 'I cannot believe your letters . . . I got so excited that things almost happened to my kidneys. This voter registration project is IT!' Under the new rulings such a letter might well have been out of bounds. Similarly, I may have lost the telling eyewitness reaction of John Doar to one of the Freedom Ride beatings in 1961: 'Oh, there are fists, punching! A bunch of men led by a guy with a bleeding face are beating them. There are no cops. It's terrible! It's terrible!' Those of you who know the taciturn, composed John Doar personally can appreciate how revealing this quotation is. It came from the private papers of Ed Guthman, who came into possession of notes taken by a secretary overhearing

> a phone conversation between Doar in Alabama and Burke Marshall in Washington."

Mr. Branch's comments not only indicate the essentiality to authors of some ability to quote from unpublished materials; they also suggest an often overlooked limitation on the scope of what is at issue here. It is not the right to quote indiscriminately from unpublished works. On the contrary, it is whether even a modest but "fair" use may be made of such material -- or whether any use, even if brief and even if it does not diminish the value of the work quoted from, must be viewed as unfair. What the Second Circuit has done is to interpret the opinion of the Supreme Court in Harper & Row, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) so as to create a virtually impregnable presumption against deeming quotations from unpublished works to be fair. The language of the Second Circuit is revealing: in its Salinger opinion it concluded that unpublished works "normally enjoy complete protection against copying." In New Era, that court concluded that even "a small . . . body of unpublished material cannot pass the fair use test, given the strong presumption against fair use of unpublished work." With language such as this being used to articulate the law, it is small wonder that the artistic and publishing community is so disturbed by these rulings.

Analytically, there is even a graver flaw to the Second Circuit's rulings. Not content with assuming that virtually any use of unpublished material causes the user to "lose" on the second of the four fair use factors set forth in Section 107 of the Copyright Act (the "nature of the copyrighted work"), the Second Circuit has moved quickly and all-but-automatically to a ruling that a party that has lost on the second factor loses as well on the critical fourth factor -- the effect of the use on the potential market for the copyrighted work. I summed up this development as follows in my testimony last July on this topic:

> "From an adverse decision on the second factor, it is a natural -- almost inevitable -- step under current law for a court to find against the defendant on the fourth factor, the effect of the use on the market for the copyrighted work -- which the courts have consistently concluded is 'the single most important element of fair use.' Nation, 471 U.S. at 566. Since the crucial preliminary question is whether the copyright holder has in fact exercised the right to publish, any dissemination before he does so will by definition interfere with a writer's opportunity initially to publish. In Salinger, for example, the Second Circuit noted that 'the impairment of the market seems likely [because t]he biography copies virtually all of the most interesting passages of Salinger's unpublished letters.' 811 F.2d at 99. It is not coincidental that in neither case interpreting the Nation has the Second Circuit not found some impairment of the market. And so, that fact that a work is unpublished leads speedily -- and dangerously easily -- to a ruling by rote in favor of the plaintiff on the

> critical fourth factor. With this victory in hand -- the second factor plus the 'most important' fourth factor -- the plaintiff cannot lose. And the plaintiff does not lose."

To say this, I want to emphasize, is not to say that the unpublished character of a quoted from work should not be deemed relevant -- and, in fact, that it generally should not tend to weigh against a finding of fair use. What is critical, however, is that the unpublished nature of the work quoted from should only "tend to weigh against" a finding of fair use; that it should not, in and of itself, require a finding of unfair use; that all four fair use factors should be considered in all cases; and that the "most important" factor (as the Supreme Court also said in the Nation case) should remain the fourth -- the effect of the use of the quoted material on the market. The current reality, however, is that as a result of these recent decisions one factor alone has become the dominant and even exclusive focus of judicial attention -- the unpublished nature of the quoted from work.

Consider the impact of such a rule of law on already published works. James Reston, Jr., the author of a recent biography, The Lone Star, dealing with the life of John Connally, has observed that:

> "Since the letters [I wished to quote] came from opened files in a presidential library, it felt as if to discover rich, unpublished material in a kind of research coup was dangerous; to use it was a crime. Good research was a form of entrapment. Better and safer, the law . . . seemed to be saying, that you rehash the stale stuff that has already appeared in print.
>
> " . . . I was informed . . . that a hostile subject of a biography could not stop publication for supposed libel, but he could enjoin publication for copyright infringement. No author, in my view, could bear that risk . . . ."

Letter, dated October 27, 1989, James Reston, Jr. to Arthur Schlesinger, Jr.

For the guidance of this Committee, I note only a few of the recent works of history, biography and current affairs which made use of primary sources and which could not have been written in the same way had the decision below been in force at an earlier time:[1]

BOOK	PRIZE WON	UNPUBLISHED MATERIAL USED
"A Bright Shining Lie" by Neil Sheehan	Pulitzer, 1989	papers of John Vann

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[1] Arthur Schlesinger, Jr., recently observed, "[I]f the law were this way when I wrote the three volumes of 'The Age of Roosevelt,' I might still be two volumes short." Newsweek, December 25, 1989, p. 80.

"Parting the "Waters" by Taylor Branch	Pulitzer, 1989	papers of Martin Luther King, Ralph Abernathy
"The Making of the Atomic Bomb" by Richard Rhodes	National Book Award, 1987	papers of J. Robert Oppenheimer, other scientists
"The Power Broker" by Robert Caro	Pulitzer, 1975	papers of Robert Moses
"Luce and His Empire," by W.A. Swanberg	Pulitzer, 1973	papers of Henry Luce
"Huey Long" by T. Harry Williams	Pulitzer, 1970	papers of Huey Long

Any rule of law that would jeopardize the research and writing of some of the great works of modern American history and biography should be reconsidered.

This legislation would do so in a manner that protects the legitimate rights of all. H.R. 2372 is a balanced, restrained and focused response to a major threat to the ability of this nation's authors to go about their work. I urge its adoption.

Mr. HUGHES. Ms. Marton, welcome.

STATEMENT OF KATI MARTON, AUTHOR, NEW YORK CITY

Ms. MARTON. Good morning. My name is Kati Marton, and I would like to thank you, Congressman Hughes and the members of the subcommittee, for allowing me this opportunity to speak on the critical issue of fair use and in support of H.R. 2372.

I am both an author and a journalist. I have come this morning to enlist your support, so that I may continue to practice both of those professions in a free and unfettered way. Without your help, I and my fellow writers, who have formed a Committee on Fair Use, including some of America's most distinguished authors of nonfiction books—David Halberstam, J. Anthony Lukas, Arthur Schlesinger, Edmund Morris, and Doris Kearns—none of us will be able to write histories, biographies, or other works of nonfiction as we presently know them. Without a reasonable agreement on what constitutes the fair use of unpublished materials, we will be reduced to the status of "court" biographers, perpetually rehashing the same, safe old stories, fearful of breaking new ground lest we become embroiled in debilitating court fights. A climate of fear and uncertainly now pervades my profession, a climate in fact more reminiscent of a totalitarian state than one taking place in the home of the first amendment.

There is an even more dangerous side effect down the road if we do not restore the practice of fair use to its traditional place, the place it occupied before the restrictions imposed by the Second Circuit Court of Appeals. If our books do not inform, we will be left with uninformed citizens. At risk is the ability of Americans to form opinions and to make sound judgments on a range of complex issues. That is a loss we can ill afford, as we attempt to sharpen our competitive edge in the world.

It seems to me inevitable, however, that if the increasingly burdensome restrictions on writers' ability to quote from unpublished letters, diaries, and other documents are not lifted, we will have only two sorts of biographies and histories: The authorized sort, which represents one man's or one woman's exclusive version of his or her own life, and the Kitty Kelley variety which, with due respect to Ms. Kelley, is not a model of good scholarship or solid documentation.

Nor are we going to have many readers left. Why should we if we turn out such mediocre pap? For, at present, we biographers and historians are prohibited from using the pungent words used by real people in their own correspondence and in their diaries, unless they have already appeared in other publications. Imagine having to paraphrase Harry Truman's wonderful expletives. Or Lyndon Johnson's. In one of the court cases which has led to our present predicament, a case involving the biography of L. Ron Hubbard, the found of Scientology, the author was faulted for quoting from a Hubbard letter saying, "There are too many Chinks in China." Paraphrased, that would read, "The indigenous population of China is too large." Not quite the same in conveying Hubbard's character, is it? Nor nearly as interesting for the reader either.

We are having a tough enough time these days getting our books read by video-mesmerized Americans, without giving anybody further cause not to read lively, interesting, but also solidly researched, *carefully documented works, which do not rely on third*-hand information, secondary sources, and twice-told tales.

Under present circumstances, writers and publishers must navigate treacherous and uncertain waters in their use of heretofore unpublished materials. Publishers, ever more fearful of lawsuits, are sometimes setting absurd limitations on using unpublished material. Most of the larger New York publishers have set a zero word limit. Not surprisingly, a substantial number of books are being withheld from publication at the authors' behest, rather than allowing them to be gutted to meet the demands of the new rule governing fair use of unpublished materials.

And yet, it is just such unpublished materials which break new ground for the reader, which can startle and surprise and inform. Unpublished materials lie at the very heart of investigative reporting. Without them, we will be reduced to books filled with the author's own conclusions and with shadowy sources whose identify must be protected. Far better to let our readers draw their own conclusions, be it regarding the Civil War or the lives of great or not-so-great Americans, based on as many carefully collected documents as the author is able to reach. Self-censorship, which is what I and my fellow authors must practice if the present situation is upheld, is no better than censorship. The first amendment was meant to safeguard against both.

Two of my books, a biography of Raoul Wallenberg, the Swedish diplomat who saved thousands of Hungarian Jews, and the Polk Conspiracy, the story of the murder and coverup of CBS correspondent George Polk would not be the same books without liberally drawing on heretofore unpublished materials. Without using unpublished sources in the Polk Conspiracy, I would not have been able to penetrate a 40-year-old thicket of official lies and rumors and reach the nub of a story: A cautionary tale about our own country's paranoid behavior in the early days of the cold war.

I am a firm believer, as was CBS correspondent George Polk during his too-brief lifetime, that if a democracy is to be more than a paper tiger, its constituency must be well informed, must be able to weigh and judge before it makes its choices. The government of a few secretive men was not the point of the exercise called America. George Polk was murdered for that sort of reporting, and for not playing by the rules of cold war politics. For he maintained that the reporter's task was to get at the truth, even if that didn't please either his own government or its allies. I discovered that 42 years after his murder, over 200 official documents regarding this case are still classified under that overused "national security" category.

There was no way I could write anything but a rehash of old rumors, if I had played strictly according to the new restrictions on fair use. I did not, and fortunately, my publisher was courageous enough to risk publication. Thus, I was able to expose an intricate conspiracy to cover up the savage murder of one of my profession's most distinguished practitioners.

I befriended former intelligence agents who were willing to share with me unpublished letters and memoranda, which cracked the 42-year-old mystery. I discovered that General "Wild Bill" Donovan, the godfather of our intelligence network, and Walter Lippmann, the eminent Washington columnist, both played highly disturbing parts in this story. Through letters written to them and by them, I gained remarkable insights into that dark period of rampant paranoia. But it is not I, the author, who is the ultimate beneficiary of those unpublished documents. It is the readers who, I believe, can gain fresh insights into his own country's sometimes shadowy history. Under the new interpretation of fair use, I would have been compelled to obtain written permission from the heirs of Donovan and Lippman and the others, to use highly damaging but historically vital material in my book. Would they have granted me such permission? And if not, whose interests would be best served if this cautionary tale about the origins of the cold war and the early compromise of American values in the battle against Communism were suppressed for another four decades? Do we really wish to give that sort of a hammerlock on history to a few people with their narrow personal motives? I hope your answer to that is a resounding "no."

Mr. HUGHES. Thank you.

[The prepared statement of Ms. Marton follows:]

PREPARED STATEMENT OF KATI MARTON, AUTHOR, NEW YORK CITY

May 30, 1991

Good Morning. My name is Kati Marton and I would like to thank you, Congressman Hughes, and the members of the Subcommittee, for allowing me this opportunity to speak on the critical issue of "fair use" and in support of H.R. 2372.

I am both an author and a journalist. I have come this morning to enlist your support so that I may continue to practice both of these professions in a free and unfettered way. Without your help, I and my fellow writers who have formed a Committee on Fair Use, including some of America's most distinguished authors of non-fiction books, David Halberstam, J. Anthony Lukas, Arthur Schlesinger, Edmund Morris and Doris Kearns, none of us will be able to write histories, biographies or other works of non-fiction as we presently know them. Without a reasonable agreement on what constitutes the "fair use" of unpublished materials, we will be reduced to the status of "court" biographers, perpetually rehashing the same, safe old stories, fearful of breaking new ground lest we become embroiled in debilitating court fights. A climate of fear and uncertainty now pervades my profession, a climate in fact more reminiscent of a totalitarian state than one taking place in the home of the First Amendment.

There is an even more dangerous side effect down the road if we do not restore the practice of fair use to its traditional place, the place it occupied before the restrictions imposed by the Second Circuit Court of Appeals. If our books do not inform, we will be left with uninformed citizens. At risk is the ability of Americans to form opinions and to make sound judgments on a range of complex issues. That is a loss we can ill afford, as we attempt to sharpen our competitive edge in the world.

It seems to me inevitable, however, that if the increasingly burdensome restrictions on writers' ability to quote from unpublished letters, diaries and other documents is not lifted, we will have only two sorts of biographies and histories: the authorized sort, which represents one man or one woman's exclusive version of his or her own life, and the Kitty Kelley variety which, with due respect to Ms. Kelley, is not a model of good scholarship or solid documentation.

Nor are we going to have many readers left. Why should we, if we turn out such mediocre pap? For at present we biographers and historians are prohibited from using the pungent words used by real people in their own correspondence and in their diaries, unless they've already appeared in other publications. Yet it's those words which breathe life into characters. Imagine having to paraphrase Harry Truman's wonderful expletives? Or Lyndon Johnson's. In one of the court cases which has led to our present predicament, a case involving the biography of L. Ron Hubbard, the founder of Scientology, the author was faulted for quoting from a Hubbard letter saying, "There are too many Chinks in China." Paraphrased that would read, "The indigenous population of China is too large." Not quite the same in conveying Hubbard's character, is it? Not nearly as interesting for the reader either.

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And yet it is just such unpublished materials which break new ground for the reader, which can startle and surprise and inform. Unpublished materials lie at the very heart of investigative reporting. Without them we will be reduced to books filled with the author's own conclusions and with shadowy sources whose identity must be protected. Far better to let our readers draw their own conclusions, be it regarding the Civil War or the lives of great or not so great Americans, based on as many carefully collected documents as the author is able to reach. Self-censorship, which is what I and my fellow authors must practice if the present situation is upheld, is no better than censorship. The First Amendment was meant to safeguard against both.

Two of my books, a biography of Raoul Wallenberg, the Swedish diplomat who saved thousands of Hungarian Jews, and the Polk Conspiracy, the story of the murder and cover-up of CBS correspondent George Polk would not be the same books without liberally drawing on heretofore unpublished materials. Without using unpublished sources in the Polk Conspiracy, I would not have been able to penetrate a forty-year old thicket of official lies and rumors and reach the nub of a story: a cautionary tale about our own country's paranoid behavior in the early days of the Cold War.

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Washington columnist, both played highly disturbing parts in this story. Through letters written to them and by them, I gained remarkable insights into that dark period of rampant paranoia. Washington saw everything through the often blinding East-West prism. But it is not I, the author, who is the ultimate beneficiary of those unpublished documents. It is the reader, who, I believe, can gain fresh insights into his own country's sometimes shadowy history. Under the new interpretation of "fair use" I would have been compelled to obtain written permission from the heirs of Donovan and Lippmann and the others, to use highly damaging but historically vital material in my book. Would they have granted me such permission? And if not, whose interests would be best served if this cautionary tale about the origins of the Cold War and the early compromise of American values in the battle against Communism were suppressed for another four decades? Do we really wish to give that sort of a hammerlock on history to a few people with their narrow personal motives? I hope your answer to that is a resounding "No."

Mr. Morril, welcome.

STATEMENT OF MARK MORRIL, ESQ., SENIOR VICE PRESIDENT AND GENERAL COUNSEL, SIMON & SCHUSTER, NEW YORK CITY, ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS

Mr. MORRIL. Thank you for the opportunity to appear here this morning. The Association of American Publishers, whom I represent this morning, includes some 230 publishers, large and small, throughout the United States. We are very grateful to you, Mr. Chairman, and to you, Mr. Moorhead, for responding so promptly to the serious threat to scholarship posed by the recent second circuit decisions which, in our view, preclude a finding of fair use of unpublished materials and letters.

I am here this morning to speak to you from the firing line, as one of the people who is called upon almost every day to make the judgment calls to ensure that our books avoid the legal pitfalls that can delay or prevent their publication. I think there are four essential points for me to communicate this morning.

First, I strongly second what Mr. Abrams said. I must tell you that the second circuit decisions have created a new rule of law for our authors. My colleagues and I have taken the position that the fair use doctrine no longer protects even minimal quotation or paraphrase from unpublished letters or other unpublished materials.

While I know there has been some question as to whether that rule of law exists, I have to tell you that when all of the smoke of concurring opinions and dissenting opinions and dissents from petitions of rehearing and law review articles clears, it is clear that those of us who make the real decisions here on a daily basis have no responsible alternative. When all is said and done, we go to the cases, to the holdings, as we have been trained to do; and we simply cannot read around the second circuit's own words, particularly in the *New Era* case, that even a small body of unpublished materials cannot pass the fair use test.

Our advice, then, is near absolute. We cannot take into account any longer whether the quoted material is factual or expressive, whether it is even publicly available in a court record or a library, whether it concerns a living subject or a dead subject, whether it is crucial to the author's theme or thesis. And we cannot even consider how limited the amount quotation is.

As Ms. Marton said, we take the position that no quotation is protected by the fair use doctrine.

My second point here today is that that rule of law and the resulting advice have created real problems for us as publishers, and for our authors, particularly our authors of critical biographies and history. Two of Simon & Schuster's authors testified before the joint committee hearings last summer that the unpublished materials that we, the publishing lawyers, tell them they can no longer use frequently are the very materials they most need to use, the crucial source materials that animate and validate their scholarship. As Mr. Branch testified, the important sources for cross-cultural scholarship, such as his, can be found in archives of local historical societies, the files of community groups, such as the NAACP, libraries, reposing in archives or government files; and without the fallback protection of the fair use doctrine, our authors have no assurance any more that they can even write the kinds of critical books that an informed public demands and deserves.

In the brief era of this new rule of law, we have already seen some books that have not been published. We have already seen valuable materials depleted from books. And we have already seen viewpoints subtly altered. We have examples already of the widow censor, who conditions access to source material on favored treatment of the biographical subject.

My third point is that this state of affairs is highly unlikely to be changed by the judiciary alone. Although it is true that the courts may respond to particular fact situations that will arise in the cases that come before them, we agree with Chief Judge Oaks of the second circuit, who testified in substance last year that the *Salinger* and the *New Era* decisions are simply too recent, too broad, and too sweeping in their pronouncement of a virtual per se rule to be cut back sufficiently in the short term to give scholarship the breathing room it needs again.

We need this legislation to help the courts back onto the right path.

Fourth and finally, I can assure you that the legislation before this subcommittee will make a real practical difference and will accomplish its purpose. The amendment will restore the application of the fair use test and enable us publishing lawyers to revert to the advice we gave before *Salinger* and *New Era*. That advice was not that our authors or we as publishers have carte blanche to quote from unpublished letters or other materials, but that the fairness of the use will be determined on a case-by-case basis without a per se rule that short-circuits the fair use factors in section 107 of the Copyright Act.

The unpublished nature of the quoted work will be one such factor and will be one element tending to weigh against the finding of fair use in most cases, but it will no longer overwhelm the analysis.

I should add that this legislation has been the subject of very intense deliberation with our colleagues from the computer industry. It takes into account their interest as well as ours, and we are very gratified for their support.

On behalf of the authors and publishers I represent here today, I urge this committee to act promptly to enact this legislation.

Thank you, Mr. Chairman.

Mr. HUGHES. Thank you, Mr. Morril.

[The prepared statement of Mr. Morril follows:]

PREPARED STATEMENT OF MARK C. MORRIL, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, SIMON & SCHUSTER, NEW YORK CITY, ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS

INTRODUCTION

Thank you Mr. Chairman and members of the Subcommittee for the privilege of appearing before you this morning. I am the General Counsel of Simon & Schuster, one of the nation's leading trade book publishers. I also speak here on behalf of my colleagues at the other publishing houses within the Association of American Publishers, which represents some 230 member companies across the nation.

I first want to add a note of appreciation, to you, Mr. Chairman, and to Mr. Moorhead for recognizing that a serious public interest problem exists as a result of the virtual per se rule in the Second Circuit governing the analysis of the "fair use" cases when unpublished letters and materials -- the building blocks of history -- are involved. The legislation you have introduced is most welcome, is most essential, and will restore the needed balancing of interests analysis required by the "fair use" doctrine of the 1976 Copyright Act.

In short, the legislation you have proposed will have an immediate and positive effect on the ability of biographers and historians to once more pursue their craft and to utilize their talents to the fullest to inform and educate the public. As counsel to a company which publishes some 750 general interest titles a year, I must advise authors constantly on whether their use of source material meets the fair use test and I must make like evaluations on behalf of the publisher, who frequently has made a very substantial investment in publication of the work.

Many of the books I review fall into the category of critical biography and historical works, so deeply and adversely affected in their writing by the recent court rulings which effectively negate the application of the fair use doctrine to unpublished materials. I speak to you directly from the firing line. The illustrations I will share with you are not hypothetical, but real situations which have arisen in my company or other publishing companies.

THE PROBLEM

Since the decision of the Second Circuit in Salinger, and even more acutely since the New Era decision, many publishing lawyers have advised their clients that both quotation and paraphrase even of minimal amounts of unpublished material is no longer permitted. In other words, in the case of unpublished materials, the fair use analysis has been forced into a mold that begins and ends with the determination that the quoted matter is unpublished.

In our view, no other practical conclusion is possible, given the Court of Appeal's determination in New Era that the use without permission of even "a small ... body of unpublished material cannot pass the fair use test, given the strong presumption against fair use of unpublished work." To those who have suggested that the publishers' counsel are overly conservative in their interpretation of Salinger and New Era, we respond that the above-quoted language leaves little room for interpretation, particularly for an author and publisher who may have invested years of time and substantial amounts of money to meet a publishing schedule which can be set aside at the stroke of the judicial pen. Indeed, to advise our clients otherwise simply would not be responsible to the publishing houses, the authors and, ultimately, to an informed public.

We are also very conscious that the publishing defendants in both Salinger and New Era prevailed in the district court, only to suffer reversal on appeal. As Chief Judge James Oakes of the Second Circuit told this Committee in support of similar legislation last summer, both Salinger and New Era contain overly broad language which has had a palpable chilling effect upon the publishing world, with no realistic prospect that the error will be corrected by the Circuit Court. Even if the court now begins to make narrow piecemeal adjustments responding to particular facts that may come before it, the broad sweep and pervasive effect of Salinger and New Era make it intolerable to depend on the possibility that the caselaw will slowly revert to its earlier state.

Our advice now is near-absolute. We tell our clients that the prohibition applies without regard to whether the material is

---Expressive language or banal statements;

---Publicly available, but not legally published, e.g. in a court record or library;

---Required to refute an inconsistent published statement of a historical figure or biographical subject;

---Concerning or by a subject living or dead;

---A tiny fragment or more of the quoted work.

The effects of these rulings have been more than just "chilling" on the speech of our authors. They have stopped cold America's historians and biographers from critical and traditional use of the original source material which animates and validates their work. Last year Taylor Branch, author of Parting the Waters, the Pulitzer Prize winning biography of Martin Luther King's life from 1954-63, who is now at work on a second volume entitled Pillar of Fire, covering the years 1964 until King's death in 1968, testified to dramatic effect about the importance of source material to historians and biographers:

> "History is written by weaving together the varied historical sources which a writer can find; quoting or paraphrasing at modest length from the rich ore of available historical sources (regardless of whether they are published, or disseminated, or unpublished) has always been an essential tool for providing intimacy, immediacy, and ambience--i.e., the truth. Such quotations are indispensable to enabling readers fully to imagine and to understand long-ago events."
>
> "Dry facts can generally be mined from sources without

> quoting or paraphrasing, but the harder challenge of vividly recreating a period, of animating historical figures, high and low, so that their passions and struggles and motives come alive, can hardly be met without some direct reliance on the revealing words and phrases and metaphors used by history's participants. Unfortunately, the telling phrases that have no substitutes are not always neatly segregated into published secondary works or collections of sources. More often, they are found in local historical society archives, in the records of community or public interest groups like local NAACP chapters, or in documents lying in libraries or archives or government files."

Similar sentiments were echoed by J. Anthony Lucas, himself the Pulitzer-prize winning author of Common Ground, and Professor Schlesinger, writing in the Wall Street Journal. Moreover, although the problem created by the recent decisions affects primarily works of history and critical biography, it is not confined to such works. The issue also has arisen already in relation to such varied works as:

---Books of literary analysis which may include illustrative material such as photographs of original manuscript pages with hand notations different from the published work;

---Chronicles of contemporary events, *e.g.*, the insider trading scandals or the savings and loan crisis, where much of the source material, legitimately obtained, may nonetheless be legally "unpublished" because it reposes in court records, business memoranda, trading records, etc.;

---True crime books, where, for example, brief jailhouse writings may reveal more about the character of the accused than chapters of personal history or factual material.

Nor is there any substitute for the fair use principle.

Publishers and authors are well-aware that neither the copyright law nor court decisions limit their right to use the underlying factual material found in an unpublished work to which they gain legitimate access. But in many instances, the words themselves are crucial, as Judge Leval wrote in the New Era case, not as a matter of literary expression, but for what the choice of words itself reveals about a subject. As Chief Judge Oakes observed in his opinion on the appeal of the same case, surely the reader is entitled to hear more than a conclusory description of the subject. Rather, the reader should be able to make a judgment of the subject's character for himself or herself, based on the quotation of just a few of the subject's own words.

Even in the brief years since the Salinger and New Era decisions, the specter of the "family censor" --- the heir who withholds permission to quote, not as a **shield** to preserve economic value in an original work or to preserve the right to choose the time of publication, but as a **sword** to coerce favorable treatment of a subject or cripple more critical analysis --- has become a reality. In the case of Wright v. Warner Books, now pending in the Second Circuit, the widow of the biographical subject of a book subtitled "Demonic Genius" withheld permission to quote banal factual material even though she previously had granted a more favored biographer to quote from some of the same works. Last year, this Committee heard about the plight of Victor Kramer, who has been unable to publish his biography of James Agee because of opposition from the Agee Estate and from Bruce Perry, who has had to delete valuable material from his biography of Malcolm X because of threats from the widow.

And it is not just the "family censor" which concerns us. The publishing community already has faced institutional censors -- organizations which seek in organized fashion to impede scholarly inquiry -- and individual censors -- persons who condition access to their materials on particular treatment in the resulting book. All of these forms of literary extortion have a detrimental effect on the public interest by forcing authors to choose between bowing to censorship and access to, or credible use of, source material.

We agree with Chief Judge Oakes that a legislative solution is urgently required because there is no reasonable prospect that the courts will be able to correct in any timely fashion the problem they have created. As noted, the publishing defendants prevailed in both the Salinger and the New Era cases, but the Second Circuit reversed and, in both cases, refused to reconsider the panel's decision en banc. Although we are hopeful that the Circuit this time will affirm the district court in Wright v. Warner Books, the facts underlying that decision are so narrow, the district court opinion itself is so clearly restrictive and the negative implications are so troubling for other circumstances, that even an affirmance on the grounds relied upon by the district court would fall far short of the clarification required in the wake of Salinger and New Era, which are, after all, very recent authority in the Circuit.

BENEFITS OF THE LEGISLATION

The proposed legislation is most welcome, because it will allow those of us who must make the legal judgment calls to revert to the advice we gave before Salinger and New Era. The legislation confirms that there is no short cut through the fair use factors and that while the unpublished nature of the quoted work is, and has been at least since the Supreme Court decision in Harper & Row v. The Nation, an important element tending to weigh against a finding of fair use, it does not overwhelm all of the other fair use considerations.

We do not seek, and would not obtain in this legislation, carte blanche to quote unpublished material. As important copyright holders themselves, publishers and authors are not anxious to expand unduly the scope of fair use or to permit any use even approaching a taking of copyrighted works, published or unpublished. We believe that the fair use doctrine now codified in the 1976 Copyright Act has served all of the pertinent interests well. Continued application of the doctrine in accordance with the long traditions of serious scholarship will provide adequate protection to copyright holders, but also will permit biographers and historians to resume their use of primary source material and will promote the ultimate purpose of the Copyright Law to increase the public's harvest of knowledge.

Finally, we in the publishing community are particularly gratified that the legislation as now drafted has satisfied all of the prior concerns of our colleagues in the computer industry. We are grateful for their patience and now for their active support of the legislation.

I thank this Committee for the opportunity to appear here today.

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Mr. HUGHES. Mr. Vittor.

STATEMENT OF KENNETH M. VITTOR, ESQ., VICE PRESIDENT AND ASSOCIATE GENERAL COUNSEL, McGRAW-HILL, INC., ON BEHALF OF THE MAGAZINE PUBLISHERS OF AMERICA

Mr. VITTOR. Thank you, Mr. Chairman. The Magazine Publishers of America would like to thank you for providing us with the opportunity to appear today. In the time available to me this morning, I would like to focus upon the special concerns, the special vulnerability that magazine publishers have, arising out of the second circuit's remarkable decisions in *Salinger* and *New Era*.

First, as journalists, magazine publishers place heavy reliance on a daily basis upon the unpublished primary source materials, the memos, the letters, the court documents, the reports, which the second circuit has now declared to be off limits, even for selective, limited quotation. These essential raw materials of all news reporting, indeed of all nonfiction writing, form the core of all investigative and news reporting published on a regular basis by magazine publishers. Indeed, publishing lawyers like myself routinely advise journalists to quote fairly and accurately from unpublished primary sources as a defense against potential libel claims.

I must tell you, it has come as a shock and a surprise to my clients to learn that they can no longer quote from unpublished materials because of the copyright problems posed in *Salinger* and *New Era*. And now we have a rule of law, a rule of law which places such invaluable primary source materials off limits even to selective, limited quotations by journalists.

This rule of law runs directly contrary to the way in which responsible magazine and other journalists perform and should perform their important first amendment roles. It renders ineffective the Copyright Act and Official and Private Secrets Act, giving copyright owners and their heirs veto power over historically significant material.

There is another factor I would like to focus your attention on, and that is especially with respect to weekly news magazines such as Time, Newsweeks, and Business Week, which we operate under exceedingly tight editorial and printing deadlines.

Preparing and distributing a weekly news magazine for timely distribution to millions of readers worldwide is a marvel of editorial and technological expertise, but any delay caused by even a temporary restraining order in a copyright case could effectively kill an entire issue of a magazine. This is a factor in our heavy reliance on unpublished materials that makes the *Salinger* and *New Era* cases so threatening to magazine publishers.

Take the *Salinger* case and apply it to magazine publishers, and you will see our concern. Say someone used unpublished letters of *Salinger* in an article about J.D. Salinger. The district court would hold not only that the author had infringed his copyright, but the district court would order the publisher to remove all those quotations from the Salinger letters.

The problem for a magazine publisher is, if that order hits us at the initial stage of our distribution and printing process, we do not have the option of withdrawing the magazine, revising the galley proofs, and then redistributing the magazine several weeks later.

It is that problem, the exceedingly tight editorial and printing deadlines we face as magazine publishers, that renders an injunction against the magazine publisher fatal to the publication and distribution of a weekly magazine. It is simply not a practical alternative for magazine publishers to distribute a weekly magazine weeks or even days late to subscribers and readers around the world.

It is for this reason that the threat of automatic injunctions is taken so seriously by magazine publishers.

In response to the *Salinger* and *New Era* cases, magazine publishers will simply engage in self-censorship and not run the risk of using even selective or limited excerpts from unpublished materials. Magazine publishers are not risk averse. We confront on a daily basis libel, privacy, subpoenas confidential source problems and the like. These are legal problems and risks which, while often complex and sometimes financially threatening, magazine publishers have learned to live with.

But confronted with the risk that the entire issue of a magazine could be killed, is a risk we simply cannot live with.

It is for these reasons that we support your proposed amendment, because it would permit publishers to once again make selective, limited use of unpublished materials. It would eliminate the reasons underlying the self-censorship that I have described to you. It would eliminate the need for lawyers like myself and the members of this panel to advise their clients that they can use no unpublished materials, no matter how selective the quotation.

We are hopeful that the amendment will reduce the number of infringement claims against publishers that make selective use of unpublished material. Also, we are pleased that the computer industry's concerns have been addressed in this narrowly drafted legislation. We believe it does not change the law of fair use as it affects computer industry concerns; that is the basis for the compromise.

In view of the importance of the issue, we believe that further study after enactment of this legislation is required, to study whether injunctions continue to be issued or threatened against publishers and journalists who try to make selective use of unpublished materials, but guess wrong.

The fair use test is an imprecise test, and there will be journalists who guess wrong about the amount of unpublished materials they choose to quote. If there is an infringement finding, we believe the Copyright Office should study whether, in those cases, automatic injunctions continue to be issued or threatened.

It is important to remember what we are not talking about here. We are not talking about systematic plagiarism, literary freelending or commercial rip-offs. Those cases may cry out for injunctive relief, which may be appropriate in those cases. We are talking about the appropriateness of enjoining a journalist who makes selective quotations from unpublished work and guesses wrong.

In closing, I would like to thank you, Mr. Chairman and Representative Moorhead, for the timely efforts you have made in addressing a serious editorial problem faced by all publishers and journalists, and we urge speedy passage of H.R. 2372.

Mr. HUGHES. Thank you, Mr. Vittor.
[The prepared statement of Mr. Vittor follows:]

STATEMENT OF KENNETH M. VITTOR
ON BEHALF OF THE
MAGAZINE PUBLISHERS OF AMERICA
BEFORE THE SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
May 30, 1991

Mr. Chairman and Members of the Subcommittee:

My name is Kenneth M. Vittor. I appear here today on behalf of the Magazine Publishers of America ("MPA"). I am Vice President and Associate General Counsel of McGraw-Hill, Inc., a member of MPA and the publisher of numerous magazines, including *Business Week*. I am the author of an article concerning the subject of this hearing entitled "'Fair Use' of Unpublished Materials: 'Widow Censors', Copyright and the First Amendment" which was published in the Fall 1989 issue of the American Bar Association's *Communications Lawyer*. I also submitted a Statement on behalf of the MPA in connection with the Joint Hearing held by the House and Senate on July 11, 1990 regarding "Fair Use and Unpublished Works."[*]

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[*] *Fair Use and Unpublished Works: Hearings on S.2370 and H.R.4263 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm. and Subcomm. on Courts, Intellectual Property and the Admin. of Justice of the House Judiciary Comm.*, 101st Cong., 2d Sess. (1990) (Statement of Kenneth M. Vittor, at 238-58) [hereinafter "*Joint Hearing*"].

MPA is the trade association representing the interests of approximately 240 firms which publish more than 1,200 consumer-interest magazines annually. MPA's members publish magazines ranging from widely circulated publications (such as *Time*, *Newsweek* and *Reader's Digest*) to special interest magazines and journals of opinion (such as *Aviation Week and Space Technology*, *Golf*, *Consumer Reports* and the *New Republic*). Over the years, MPA has been recognized as the voice of the American magazine industry on numerous issues of public policy, including copyright.

The Salinger and New Era Decisions

MPA appears today before this Committee in strong support of Title I ("Fair Use"), Section 101 ("Fair Use Regarding Unpublished Works") of H.R.2372 ("Copyright Amendments Act of 1991") introduced by Chairman Hughes and Representative Moorhead. MPA also supports S.1035 introduced by Senator Simon (and joined by Senators Leahy, Hatch, DeConcini, Kennedy, Kohl and Brown). The proposed amendment to §107 of the Copyright Act, designed to restore the appropriate balance between the interests of journalists and authors to make fair use of unpublished materials and the rights of copyright owners to control the publication or use of their unpublished works, has been necessitated by the remarkable -- and deeply troubling -- series of recent copyright decisions by the United States Court of Appeals for the Second Circuit in *Salinger v. Random House, Inc.* (J.D. Salinger biography)* and *New Era Publications Int'l v. Henry Holt & Co.* (L. Ron Hubbard biography)**

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* 650 F.Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90(2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

** 695 F.Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir.), *reh'g denied en banc*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1168 (1990).

In *Salinger*, the Second Circuit ordered the District Court to issue a preliminary injunction barring the publication of a serious biography of author J. D. Salinger because of the biographer's unauthorized quotations from Salinger's unpublished letters. In so ruling, the Court of Appeals stated unequivocally that unpublished works "normally enjoy complete protection against copying any protected expression." (811 F.2d at 97) Indeed, the Second Circuit concluded in *Salinger*: "If [a biographer] copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined." (811 F.2d at 96)*

In *New Era*, the Second Circuit held that the publisher of a highly critical biography about L. Ron Hubbard, the controversial founder of the Church of Scientology, had infringed copyrights in Hubbard's unpublished diaries and journals. The Hubbard biographer had used selected excerpts from these previously unpublished materials to refute the public image of Hubbard promoted by the Church of Scientology and to illustrate perceived flaws in Hubbard's character. The Second Circuit made it clear in *New Era* that an injunction would have been ordered against the publisher of the Hubbard biography but for the plaintiff's unreasonable delay in commencing the copyright infringement lawsuit. In the chilling words of the Second Circuit: "[T]he copying of 'more than minimal amounts' of unpublished expressive material calls for an injunction barring the unauthorized use ..." (873 F.2d at 584)*

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* While continuing to support the issuance of an injunction in *Salinger*, the author of the Second Circuit's opinion in *Salinger* has conceded that: "[i]t would have been preferable to have said in *Salinger* '. . .he deserves to be found liable for infringement'" rather than "he deserves to be enjoined." *See* *New Era Publications Int'l* v. *Henry Holt & Co*., 884 F.2d 659,663 n.1 (2d Cir. 1989) (Newman, J., dissenting from denial of rehearing).

Effect of the Second Circuit's Decisions Upon Magazine Publishers

In the wake of the Salinger and New Era decisions by the Second Circuit, it is now clear -- and publishers' lawyers have no choice but to advise magazine editors -- that almost any unauthorized use by a magazine of previously unpublished materials which is challenged by a copyright owner will inexorably lead to a judicial finding of copyright infringement. Moreover, the Second Circuit's rulings in Salinger and New Era leave no doubt that such a finding of copyright infringement will almost always result in the automatic issuance of an injunction against the publisher of previously unpublished materials. As Chairman Hughes observed when he introduced H.R.2372:

> "Decisions of the Circuit Court of Appeals for the Second Circuit regarding this consideration - whether the work in question is published or unpublished - threaten to create a per se rule. Under a per se rule, if the work is unpublished, there can be no fair use." Cong. Rec. E 1821 (daily ed. May 16, 1991).

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* While reiterating his support for the issuance of an injunction in the New Era case but for the laches problem, the author of the New Era opinion has amended the sentence quoted above by adding the phrase "under ordinary circumstances" at the beginning of this passage. See New Era Publications, Int'l v. Henry Holt & Co., 884 F.2d 659,662 (2d Cir. 1989) (Miner, J., concurring in denial of rehearing). It is certainly no comfort to magazine publishers and journalists -- or their attorneys -- to know that injunctions will be issued "under ordinary circumstances" whenever an author uses "more than minimal amounts" of unpublished materials.

The result: vast quantities of unpublished primary source materials -- "the essential raw materials" of all non-fiction writing, according to author J. Anthony Lukas* -- previously available for selective quotation by magazine publishers and journalists under the fair use provisions of the Copyright Act are now off-limits. Magazine publishers and editors, confronted on deadline with the inhibiting prospect of copyright litigations and automatic injunctions, will engage in self-censorship and simply decide to refrain from quoting from unpublished primary source materials such as letters, reports and memos.**

The Second Circuit's wooden application of the fair use provisions of the Copyright Act to unpublished materials has in effect rendered the Copyright Act an official -- and private -- secrets act giving copyright owners and their heirs complete veto power over publishers' and journalists' quotations from historical source materials. As Chairman Hughes has concluded: "These decisions seem to have strayed from the balancing of interests approach embodied in the fair use doctrine. They suggest that there is an absolute and unlimited property right in the owner of an unpublished work, and that all other fair use considerations are meaningless." Cong. Rec. E 1821 (daily ed. May 16, 1991). The Second Circuit has apparently forgotten, as

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* Joint Hearing, Statement of J. Anthony Lukas, at 177.

** Not surprisingly, the Salinger and New Era decisions have generated a firestorm of critical articles. See, e.g., articles cited in Judge Oakes's article, "Copyright and Copyremedies: Unfair Use and Injunctions," 18 Hofstra L. Rev. 983, 1000 n.124. See also articles cited in Bilder, "The Shrinking Back: The Law of Biography," 43 Stan. L. Rev. 299, 307 n.48 (1991).

District Court Judge Leval reminds us, that: "Quoting is not necessarily stealing. Quotation can be vital to the fulfillment of the public-enriching goals of copyright law." Leval, "Toward a Fair Use Standard", 103 *Harv. L. Rev.* 1105, 1116 (1990).*

Hypotheticals

To illustrate how the Second Circuit's recent copyright decisions regarding fair use of unpublished materials have adversely affected and threaten magazine publishing, let us pose two hypotheticals for your consideration.

1. *The Secret LBJ-Nixon Correspondence*. Suppose that former Presidents Lyndon Johnson and Richard Nixon had commenced a secret exchange of private correspondence following President Johnson's announcement in April 1968 that Johnson would not seek re-election. Suppose further that the secret LBJ-Nixon correspondence, which continued until President Johnson's death in 1973, is uncovered by a magazine journalist while the

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* In sharp contrast to the Second Circuit's harsh treatment in *Salinger* and *New Era* of publishers' quotations from unpublished materials, a panel of the Second Circuit has acknowledged the importance and necessity of quotations in a copyright decision -- the *New Era* v. *Carol Publishing* case -- upholding the fair use of *published* materials by yet another Hubbard biographer. Thus, the Court of Appeals observed in *Carol Publishing*: "[T]he use of the quotes here is primarily a means for illustrating the alleged gap between the official version of Hubbard's life and accomplishments, and what the author contends are the true facts. For that purpose, some conjuring up of the copyrighted work is necessary." *New Era Publications International* v. *Carol Publishing Group*, 904 F 2d 152, 159 (2d Cir. 1990), *rev'g* 729 F.Supp. 992 (S.D.N.Y. 1990). We believe the same "conjuring up of the copyrighted work" is necessary and appropriate with respect to quotations from unpublished materials.

reporter is researching a retrospective article on the Vietnam War. Assume that the unpublished private correspondence includes significant revelations regarding the two Presidents' personalities and political thinking and reveals previously undisclosed information about the two Presidents' conduct of the Vietnam War.

The magazine journalist in our hypothetical includes a limited number of carefully selected verbatim excerpts from the secret LBJ-Nixon correspondence in the article in order to substantiate the reporter's critical analysis of the two Presidents' conduct of the Vietnam War. The journalist quotes from the unpublished letters because he concludes in good faith that he cannot separate the facts or ideas set forth in the letters from the unique form in which they have been expressed by Presidents Nixon and Johnson. Representatives of President Johnson's estate and President Nixon, learning of the existence of the secret correspondence immediately prior to publication of the magazine article when approached by the journalist for comment, respond by filing a copyright infringement litigation in New York against the magazine publisher.

The result: under the Second Circuit's copyright decisions in Salinger and New Era, the magazine publisher would not only be held to have infringed the copyrights in the unpublished letters owned by the Johnson estate and President Nixon, but would be subjected to the issuance of an injunction barring the publication of the article and the magazine unless the infringing quotations, and all close paraphrases, from the Johnson-Nixon correspondence were deleted in their entirety. If the magazine article were already in production, the printing, distribution and promotion of an entire magazine would be disrupted, delayed or possibly cancelled, at enormous financial -- and editorial -- cost to the publisher.

2. The Revealing Corporate Memo. In this hypothetical, suppose a magazine journalist for a business magazine researching allegations regarding a corporation's controversial financial practices receives in the mail an unsolicited copy of an internal employee memo from the corporation's files. The revealing memo substantiates an employee's claims to the magazine reporter that the corporation has engaged in illegal conduct. For example, assume that the internal corporate memo describes an elaborate financial scheme apparently designed to avoid the corporation's financial disclosure obligations under the federal securities and the foreign corrupt practices laws. As a responsible journalist, the reporter approaches the corporation for comment prior to publication of the article which will include selected -- but devastating -- quotations from the damaging memo. In response, the corporation not only threatens to sue the magazine for libel but, as the owner of the copyright in the internal employee memo, proceeds to file a copyright infringement claim in New York prior to publication seeking to enjoin the publication of the article and the magazine on the grounds of copyright infringement.

Again, in view of the Second Circuit's copyright decisions in Salinger and New Era, the court would have no choice but to hold that the magazine had indeed infringed the corporation's copyright in the unpublished employee memo. Moreover, while the law is clear that the corporation would never be able to obtain a pre-publication injunction against publication of the article by reason of the corporation's purported libel claims against the magazine, the Second Circuit's recent copyright decisions would mandate an injunction arising from the corporation's copyright infringement claims.

H.R.2372

MPA believes Title I of H.R.2372 would restore the Copyright Act's delicate balance between the rights of publishers and journalists to quote selectively from, and make fair use of, unpublished works and the rights of copyright owners to control the publication and use of their unpublished materials. Title I of H.R.2372 would also eliminate the substantial confusion and debate about the scope of fair use of unpublished materials which has been engendered by the Second Circuit's controversial fair use decisions.* By clarifying that "[t]he fact that a work is unpublished ... shall not bar a finding of fair use, if such finding is made upon full consideration of all the factors set forth in paragraphs (1) through (4) [of 17 U.S.C. §107]", the proposed amendment would make it clear to courts that publishers should not be totally precluded from making any use of unpublished materials. The mere fact that a copyrighted work is unpublished should not automatically disqualify such materials from fair use just as the fact a work is published does not automatically permit a publisher to make unfettered use of these materials.

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* The need for clarification of this important copyright issue is demonstrated by the extraordinary number of articles which have been written by many of the judges who participated in the Salinger and New Era cases in an apparent attempt to explain the Second Circuit's fair use jurisprudence. See Oakes, "Copyrights and Copyremedies: Unfair Use and Injunctions," 18 Hofstra L. Rev. 983 (1990); Newman, "Not the End of History: The Second Circuit Struggles with Fair Use," 37 J. Copr. Soc'y 12 (1989); Miner, "Exploiting Stolen Text: Fair Use or Foul Play?," 37 J. Copr. Soc'y 1 (1989); Newman, Manges Lecture, 12 Colum. J. L. Arts 167 (1989); Leval, "Toward a Fair Use Standard," 103 Harv. L. & Rev. 1105 (1990); Leval, "Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture," 36 J. Copr. Soc'y 167 (1989). See also Joint Hearing, Statements of Hon. James L. Oakes (81-89); Hon. Roger J. Miner (90-100); Hon. Pierre Leval (101-43).

Moreover, the proposed amendment would make it clear that the unpublished nature of a copyrighted work "shall not diminish the importance traditionally accorded to any other consideration under [§107]." Title I of H.R.2372 would mandate that each fair use dispute involving unpublished materials should be judged on its merits following a careful judicial balancing of all of the four fair use factors set forth in §107.[*] For example, the fourth factor ("the effect of the use upon the potential market for or value of the copyrighted work") has been held by the Supreme Court to be "undoubtedly the single most important element of fair use." *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 566 (1985). In those cases where there would be little or no market impact arising out of a journalist's limited use of an unpublished memo or letter -- *e.g.*, use of 50-year old historical materials still protected by copyright -- Title I of H.R.2372 would permit courts to hold that the interests of a journalist in such situations outweighed the rights of an unpublished work's copyright owner.

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[*] *See*, *e.g.*, *Wright* v. *Warner Books, Inc.*, 748 F. Supp. 105 (S.D.N.Y. 1990), *appeal pending*, No. 90-9054 (2d Cir), where Circuit Court Judge Walker (sitting by designation) utilized a full four-factor analysis (748 F. Supp. at 108-13) to hold the publisher's use of unpublished materials to be fair; *see also Arica Institute, Inc.* v. *Helen Palmer and Harper & Row Publishers, Inc.*, 1991 U.S. Dist. LEXIS 4731 (S.D.N.Y. April 10, 1991), where District Court Judge Patterson found (*29-*33) a publisher's use of unpublished materials to be fair following a full four-factor analysis.

MPA notes that the proposed amendment will make no change in the law of fair use as it affects the computer industry's concerns. MPA has worked closely with computer industry representatives and congressional staffs to ensure that the proposed fair use amendment is carefully crafted to solve the specific problems caused by the Second Circuit's opinions in the *Salinger* and *New Era* cases. MPA appreciates the computer industry's willingness to work with publishers, journalists and authors to address the serious editorial problems caused by the Second Circuit's recent fair use decisions.

Automatic Injunctions

MPA believes Congress should also address the problems engendered by the Second Circuit's rigid rules in *Salinger* and *New Era* concerning the automatic issuance of injunctions in copyright cases. We recognize that several Second Circuit judges have attempted in subsequent opinions issues in connection with the Second Circuit's denial of a rehearing in *New Era* to clarify the Second Circuit's draconian statements regarding the automatic issuance of injunctions.* Unfortunately, those expressions of judicial opinion are nothing more than non-binding _dicta_. Moreover, Judge Miner is careful to point out in his rehearing opinion (884 F.2d at 661-62) that the _New Era_ panel majority still maintains its prior view that an injunction would have been a proper remedy in _New Era_ but for the _laches_ problem. Similarly, Judge Newman still finds no problem with the preliminary injunction issued in the _Salinger_ case because the injunction did not "halt distribution of a book already in publication; the injunction required the defendant only to revise galley proofs to delete infringing material prior to publication." (884 F.2d at 663).

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* *See, e.g.*, Judge Miner's concurring opinion, 884 F.2d at 661: "All now agree that injunction is not the automatic consequence of infringement and that equitable considerations always are germane to the determination of whether an injunction is appropriate". *See also* Judge Newman's dissenting opinion, 884 F.2d at 664: "[E]quitable considerations, in this as in all fields of law, are pertinent to the appropriateness of injunctive relief. The public interest is always a relevant consideration for a court deciding whether to issue an injunction."

Given the exceedingly tight editorial and printing deadlines faced by magazine publishers, a preliminary injunction such as that issued in _Salinger_ would kill the article in question (and possibly the entire issue of the magazine). For example, if a preliminary injunction were issued against a weekly news magazine during the initial stages of the magazine's worldwide printing and distribution, the only practical means of complying with such an injunction would be to cease all distribution of the entire magazine and to cancel that week's issue. Magazine publishers, confronted with tight deadlines and the need to provide timely information to their worldwide subscribers, simply cannot delay the publication of a weekly news magazine until a final court ruling is obtained. Accordingly, MPA believes the need for a congressional response to the injunction issue remains.

We submit that the Second Circuit's recent copyright rulings virtually requiring the issuance of an injunction following any finding of copyright infringement are in direct conflict with the discretionary language of the Copyright Act, which simply provides that "any Court ... _may_ ... grant temporary and final injunctions." (Emphasis supplied) Courts in other jurisdictions have been quick to exercise such discretion in copyright infringement cases and have denied injunctive relief where damages remedies adequately compensated the copyright owner.* In view of *Salinger* and *New Era*, Congress should reaffirm the clear language and intent of the Copyright Act that injunctive remedies are discretionary in copyright infringement cases. As Second Circuit Judge Oakes observed in a recent law review article:

> "[I]t must be remembered that we are not talking here about plagiarism or piracy, a fundamental distinction that must be kept in mind. Rather, we are talking about the work of historians, biographers and journalists. Professor Schlesinger believes that, 'when responsible scholars gain legitimate access to unpublished materials, copyright should not be permitted to deny them use of quotations that help to establish historical points.' I agree in a large sense. What we should be concerned with is the kind of writing and the quality of use that should enter into the choice of a remedy. *The finest of fine tuning is essential*, something I think Judge Leval in *New Era* attempted to engage in. *What is not necessary, is a wooden-like approach that threatens to enjoin every work that quotes from an unpublished writing of a biography, history-maker or public person in the news*." (Emphasis supplied; footnotes omitted)**

MPA submits that the Second Circuit's mandatory injunction policy is at odds not only with the express language of the copyright law but, perhaps more importantly, with the underlying policies of the Copyright Act. The purposes of the Copyright Clause as set forth in the Constitution -- 'To promote the Progress of Science and useful Arts ... " -- are ill-served by the automatic and permanent suppression of journalistic, literary and historical works utilizing selective excerpts from unpublished materials. As District Court Judge Leval -- the trial judge in both the Salinger and New Era cases -- has observed:

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* *See, e.g., Abend* v. *MCA, Inc.*, 863 F.2d 1465, 1478-80 (9th Cir. 1988), *aff'd on other grds*, 110 S.Ct.1750 (1990) (*Rear Window* case); *Belushi* v. *Woodward*, 598 F.Supp. 36, 37-38 (D.D.C. 1984)(John Belushi biography). *See also* 3 *Nimmer on Copyright* §14.06[B] at 14-61 to 14-62 (1990); Abrams, "First Amendment and Copyright," 35 *J. Copr. Soc'y* 2, 10-12 (1987); Goldstein, "Copyright and the First Amendment," 70 *Colum. L. Rev.* 983, 1030 (1970).

** Oakes, "Copyrights and Copyremedies: Unfair Use and Injunctions," 18 *Hofstra L. Rev.* 983, 1002 (1990).

> "When we place all unpublished private papers under lock and key, immune from any fair use, for periods of 50-100 years, we have turned our backs on the Copyright Clause. We are at cross-purposes with it. We are using the copyright to achieve secrecy and concealment instead of public illumination."*

MPA submits that a Copyright Act truly sensitive to First Amendment values cannot and should not be interpreted to permit prior restraints to be issued routinely upon a finding of copyright infringement. The almost insurmountable obstacles to the issuance of prior restraint in areas of the law as disparate -- and as important -- as libel, national security and fair trial/free speech disputes render it difficult as a matter of constitutional law and policy to countenance such a drastic remedy becoming routine in copyright litigations. If the First Amendment barred enjoining the publication of the entire Pentagon Papers notwithstanding the serious national security issues cited by the government, why should selective quotations from an important public figure's unpublished letters serve as the basis for an automatic injunction under the Copyright Act? As Judge Leval concluded in his New Era ruling: "The abhorrence of the First Amendment to prior restraint is so powerful a force in shaping so many areas of our law, it would be anomalous to presume casually its appropriateness for all cases of copyright infringement." (695 F.Supp. at 1525)*

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* Leval, "Fair Use or Foul?, The Nineteenth Donald C. Brace Memorial Lecture", reprinted in 36 J. Copr. Soc'y 167, 173 (1989). See also Leval, "Toward a Fair Use Standard," 103 Harv. L. Rev. 1105, 1130-35 (1990).

MPA believes the injunctive remedy should be utilized against publishers, journalists and authors as the remedy of last resort under the Copyright Act and only after a court has concluded that the monetary damages remedy already available under the Copyright Act is inadequate and that the infringed party has actually suffered, or will suffer, irreparable harm. MPA submits that courts in copyright infringement litigations involving publishers, journalists and authors should be required to make a finding of irreparable harm rather than simply ritualistically presuming irreparable harm in the event copyright infringement has been found. Courts in such cases should also determine whether "great public injury would be worked by an injunction" (3 Nimmer on Copyright §14.06[B] at 14-61 (1990)), and if so, whether monetary damages would be a preferable alternative. As Second Circuit Judge Oakes explained in dissenting from the Court of Appeals's decision in New Era: "Enjoining publication. . .is not to be done lightly. The power to enjoin ... must be exercised with a delicate consideration of all the consequences." (873 F.2d at 596)

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* In his recent law review article, Judge Oakes concluded:

> "Sensitivity to the public interest has always been taken into account in the granting or denial of injunctions. Why that should be true of all but the copyright portion of the law of intellectual property dealing with unpublished material is a question to which I cannot fathom an answer. Why is anyone so afraid of the first amendment as to think that it should not play a role?" Oakes, "Copyrights and Copyremedies: Unfair Use and Injunctions," 18 Hofstra L. Rev. 983, 1003 (1990).

Proposed Copyright Office Study

MPA is hopeful that passage of Title I of H.R.2372 will substantially reduce the number of infringement claims and findings against publishers, journalists and authors who make selective use of previously unpublished materials, thereby reducing the number of infringement cases where the issue of injunctive relief will need to be raised. We are also hopeful that the legislative history of these proceedings together with the favorable clarifying dicta regarding injunctive relief in the Second Circuit's New Era rehearing opinions will quickly translate into judicial decisions in the Second Circuit and elsewhere refusing to issue automatic injunctions following infringement findings against publishers and authors.

MPA believes, however, that the injunction issue is so fundamental to the proper operation of the Copyright Act -- and the First Amendment -- that Congress needs to monitor the situation closely to determine whether further legislative intervention is required. Accordingly, MPA proposes that Congress formally request the Copyright Office to undertake a study of fair use litigations under the Copyright Act after Title I of H.R.2372 is enacted to determine whether federal courts continue to issue or threaten injunctions against publishers, journalists and authors in copyright infringement cases and, if so, under what circumstances. MPA believes Congress should ask the Copyright Office to determine specifically whether the Second Circuit, or any of the other federal courts, follow the automatic injunction rules set forth in the *Salinger* and *New Era* decisions or whether courts in fair use cases involving publishers, journalists or authors adopt the equitable, public interest approaches followed by the federal courts prior to the *Salinger/New Era* cases and apparently endorsed by several Second Circuit judges in the *New Era* rehearing opinions. MPA proposes that Congress ask the Copyright Office to submit the results of this important study to Congress by September 1992. Congress should review the Copyright Office's findings to determine whether further remedial legislation is required to address the important injunction question.

Conclusion

MPA applauds the timely efforts by Chairman Hughes and Representative Moorhead to address the serious editorial problems engendered by the Second Circuit's recent fair use jurisprudence. MPA believes remedial legislation is clearly necessary to correct the *Salinger* and *New Era* decisions. We do not believe -- as Second Circuit Judge Newman has recommended in an article* -- that magazine and other publishers should be required to attempt to litigate piecemeal "solutions" to the real and immediate editorial problems caused by the Second Circuit's copyright decisions. Moreover, such pre-publication litigation "solutions" to the Second Circuit's rulings are not a practical alternative for magazine publishers and journalists who are inextricably tied to tight editorial and printing deadlines.

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* Newman, "Not the End of History: The Second Circuit Struggles with Fair Use," 37 *J. Copr. Soc'y* 12, 17-18 (1990).

MPA submits that the public interest will be best served by a Copyright Act and a fair use doctrine that both permit magazine publishers, journalists and authors to make selective quotations from unpublished works and respect the rights of copyright owners to control the publication of their unpublished materials. We submit that Title I of H R.2372 would restore the delicate balance of the fair use provisions of the Copyright Act which has been destroyed by the Second Circuit's ill-advised decisions in Salinger and New Era.

Kenneth M. Vittor
Magazine Publishers of America

APPENDIX to Statement of Kenneth M. Vittor

Communications Lawyer
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"Fair Use" of Unpublished Materials: "Widow Censors," Copyright and the First Amendment

BY KENNETH M. VITTOR

Assume, for the moment, that you are counsel to the publisher of a soon-to-be published unauthorized biography of former President Richard M. Nixon. The biographer's draft manuscript includes a limited number of previously unpublished excerpts from President Nixon's personal diary and recently discovered letters. The verbatim quotations from the Nixon diary and letters disclose significant revelations regarding the Watergate scandal, the Nixon-Kissinger diplomatic gambit to China, the "secret" war in Cambodia and Nixon's conduct of the Vietnam War. The excerpts from the Nixon diary and letters, like the Watergate tapes, capture the former President's often caustic and revealing opinions of world and domestic leaders, public personalities and contemporary affairs in memorable expressions frequently at odds with Nixon's previously published statements. The author proposes to use a limited number of carefully selected verbatim excerpts from the Nixon diary and letters in order to buttress the biographer's critical findings about the former President and to permit readers to draw their own conclusions about the author's analysis of the Nixon presidency. The editor of the biography seeks your advice as to whether there are any legal problems concerning the biographer's proposed unauthorized use of the previously unpublished Nixon diary and letters.

* * *

The resolution of the copyright issue framed in this publishing lawyer's fantasy should be difficult, requiring a delicate balancing under the Copyright Act of the former President's proprietary rights in the unpublished diary and letters and the biographer's—and history's—competing claims to quote such invaluable original sources in order to better understand President Nixon and the turbulent era of his presidency. Unfortunately, the answer to my hypothetical has been rendered all too simple by a recent series of highly restrictive—and controversial—interpretations by the United States Court of Appeals for the

Continued on page 24

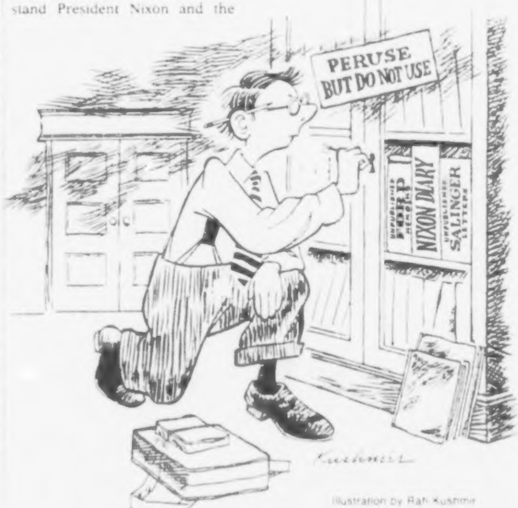

Illustration by Rafi Kushnir

"WIDOW CENSORS"

Continued from page 1

Second Circuit of the scope of "fair use" of unpublished materials under the Copyright Act.

Notwithstanding the potential historical importance of the quotations from the Nixon diary and letters and regardless of whether the biographer exercised scholarly care in selecting a limited number of brief excerpts from the diary and letters to support the author's historical findings and opinions, your legal advice to the eager editor would have to be distressingly clear: unless the author agrees to delete all quotations (and all close paraphrases) from the diary and letters, it is likely—indeed, almost certain—that publication and distribution of the biography would be enjoined in the event the former President—or upon his death, Nixon's literary executor—filed a copyright infringement lawsuit seeking an injunction under the remedial provisions of the Copyright Act. Following the remarkable series of recent copyright decisions by the Second Circuit in *New Era Publications International, ApS v. Henry Holt and Company, Inc.*, 873 F.2d 576 (2d Cir.), *rehearing denied*, ____ F.2d ____ (August 29, 1989) (L. Ron Hubbard biography) and *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 108 S. Ct. 213 (1987) (J.D. Salinger biography), it is now clear (at least in the Second Circuit) that almost any unauthorized use of previously unpublished materials challenged by a copyright owner will inexorably lead to a finding of copyright infringement, which in turn will almost always result in the automatic issuance of an injunction.

This article will trace the recent evolution of the "fair use" doctrine in an attempt to demonstrate that the Second Circuit's wooden application of the "fair use" provisions of the Copyright Act against users of previously unpublished materials is not mandated either by the language—or the broad educational purposes—of the Copyright Act or by the United States Supreme Court's "fair use" ruling in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). Moreover, the almost automatic injunctions which have been issued or threatened against publishers of serious biographies are, I submit, fundamentally at odds with the underlying purposes and values of both the Copyright Act and the First Amendment.

The Rules of the Game: A Copyright Law Primer

In order to understand the controversy surrounding the Second Circuit's recent "fair use" jurisprudence, a review of several basic copyright principles might be helpful.

Idea/Expression Dichotomy

Copyright only protects the form of expression adopted by the original author and not the underlying ideas or facts described by the author. An author cannot copyright ideas or facts even if the author expended substantial amounts of time, effort, and money to discover or develop such ideas and facts. Thus, even in the absence of a "fair use" defense, the Nixon biographer in our hypothethical would be free—at least under the copyright law—to discuss any ideas or facts disclosed in the unpublished Nixon diary and letters provided President Nixon's form of expression was not copied or paraphrased too closely by the author. The difficult copyright—and, I would submit, First Amendment—problem arises when a purported "fair user" of unpublished materials genuinely believes it is not possible to separate the facts or ideas from the form in which they have been expressed by the original author—*e.g.*, the biographer in our hypothetical concludes in good faith that President Nixon's form of expression is itself the fact and must therefore be quoted.

Unpublished Letters

A letter writer's unpublished letters, like other unpublished materials, are fully protected under the present Copyright Act from the moment they are set down on paper ("fixed in any tangible medium of expression"). Recipients of letters own only tangible physical property rights in the letter—*e.g.*, a recipient could sell the copy of the letter or deposit the letter in a research library—but the letter writer retains all literary property rights in the letter. Thus, President Nixon has the right under the Copyright Act to decide when, if ever, he chooses to publish his private correspondence.

The "Fair Use" Factors

The Copyright Act expressly recognizes "fair use" limitations (17 U.S.C. § 107) on a copyright owner's otherwise exclusive literary property rights (§ 106), providing that "fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright." Significantly, there is no exception or special treatment in the statute regarding unpublished materials; the Copyright Act's "fair use" limitations on the copyright owner's otherwise exclusive rights apply both to published and unpublished materials.

To assist courts in determining whether a particular use is "fair," the Copyright Act lists (without explanatory commentary) the following four illustrative, non-exclusive "fair use" factors:

1. the purpose and character of the use;
2. the nature of the copyrighted work (*e.g.*, published or unpublished);
3. the amount and substantiality of the portion used relative to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for the copyrighted work.

Recent "Fair Use" Cases Involving the Unauthorized Use of Unpublished Materials

1. *Harper & Row v. Nation*

Analysis of recent "fair use" jurisprudence must commence with the Supreme Court's 1985 decision in the *Harper & Row v. Nation* case. The Supreme Court held in *Harper & Row* that the unauthorized use by *The Nation* of ver-

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batim quotations from President Gerald Ford's soon-to-be published memoirs in a 2,250-word article was not a "fair use" under the Copyright Act. In so holding, the Court was greatly influenced by the timing of the publication of *The Nation* article, which was expressly intended to "scoop" an authorized pre-publication article about the Ford memoirs scheduled to appear in *Time*. As Justice O'Connor, writing for the majority, concluded: "*The Nation* effectively arrogated to itself the right of first publication, an important marketable subsidiary right." *The Nation* article resulted in *Time*'s cancellation of its agreement with Harper & Row for exclusive first serialization rights to President Ford's memoirs.

It was in this unusual factual context that the Supreme Court discussed the general scope of "fair use" of unpublished works. While recognizing that the 1976 Copyright Act extended copyright protection—and, significantly, the Act's "fair use" provisions—to all works, published and unpublished, the Court reiterated the common-law presumption that an unauthorized use of an unpublished work is generally not a "fair use." Noting that "the scope of fair use is narrower with respect to unpublished works," Justice O'Connor observed: "[T]he unpublished nature of a work is '(a) key, though not necessarily determinative, factor' tending to negate a defense of fair use." The Supreme Court concluded: "Under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use."

Several points are worth noting regarding the Supreme Court's ruling in *Harper & Row v. Nation*. First, a careful reading of Justice O'Connor's opinion indicates that the Court never intended to create a *per se* rule against the unauthorized use of unpublished materials. Rather, a rebuttable presumption was promulgated which in the exceptional case—perhaps my Nixon hypothetical?—might be overcome if the requisite showing is made by the purported "fair user." A central flaw in the Second Circuit's recent "fair use" decisions is the transformation of the Supreme Court's rebuttable presumption into a seemingly absolute rule against almost any unauthorized use of unpublished materials.

Second, while frequently cited as an "unpublished works" case, the *Harper & Row v. Nation* decision is not really about the copyright protections to be afforded "unpublished works." I believe the Supreme Court's ruling is more properly understood as an attempt by the Court to protect the right of authors to choose the timing of the first publication of their soon-to-be published works. Viewed in the context of an author such as President Ford who clearly intended to publish his soon-to-be published manuscript, the Court's strong presumption against the unauthorized use of unpublished works is entirely consistent with the motivational purposes of the Copyright Clause in the Constitution—*i.e.*, "To promote the Progress of Science and useful Arts . . . ." Such a strong presumption against the "fair use" of unpublished works is less defensible, however, when applied to authors or copyright owners of unpublished materials who, perhaps for reasons of privacy or fear of criticism, never intend to publish their unpublished works. How are the broad educational purposes of the copyright law served by permitting copyright owners to block even the most limited use of unpublished works by serious biographers and historians, especially when such copyright owners are public officials or public figures?

This troubling question was raised in an eloquent—and provocative—speech given at New York University in April 1989 by United States District Judge Pierre N. Leval (the trial judge at odds with the Second Circuit in both the *Salinger* and *New Era* cases). Noting the ominous rise "of a new powerful potentate in the politics of intellectual life—the widow censor" who, in the wake of the Second Circuit's recent rulings, is now empowered to veto all unauthorized quotations by historians and biographers from the unpublished works of deceased public figures, Judge Leval observed:

> [I] believe the Court [in *Harper & Row v. Nation*] went too far in suggesting that the unpublished nature of a document *inevitably* disfavors fair use. It is one thing to bar the scooping of a text headed for publication. But compare such a manuscript to letters or memos, written as private communications, some of them as much as 40-60 years prior to the secondary use, which can be expected even after the death of the author to be withheld from publication by executors or assignees for 50 further years of copyright protection.
>
> When we place all unpublished private papers under lock and key, immune from any fair use, for periods of 50-100 years, we have turned our backs on the Copyright Clause. We are at cross-purposes with it. We are using the copyright to achieve secrecy and concealment instead of public illumination. (Emphasis in original.)

2. *Salinger v. Random House*

Judge Leval's concerns regarding the troubling copyright policy implications of the "fair use" rules and presumptions set forth in the *Harper & Row v. Nation* decision are vividly illustrated by the Second Circuit's recent opinions in the *Salinger v. Random House* and *New Era v. Henry Holt* cases. In *Salinger*, the Second Circuit directed Judge Leval to issue a preliminary injunction barring the publication by Random House of a serious biography of well-known writer J.D. Salinger by Ian Hamilton, a renowned biographer and a literary critic for *The London Sunday Times*. Judge Jon O. Newman, writing for a unanimous three-judge panel, held that the biographer's unauthorized quotations from (and close paraphrases of) Salinger's unpublished letters—which the biographer had uncovered in various university research libraries—did not constitute "fair use." While purportedly following the rebuttable presumption rule in *Harper & Row*, the *Salinger* opinion clearly suggests that unauthorized copying of unpublished works will always constitute copyright infringement. As Judge Newman observed in *Salinger*:

> [W]e think that the tenor of the [Supreme] Court's entire discussion of unpublished works [in *Harper & Row*] conveys the idea that such works normally enjoy *complete protection against copying any protected expression*. (Emphasis supplied)

The panel in *Salinger* was not troubled by the prospect of permitting Salinger and his literary executors to prohibit serious biographers from quoting or paraphrasing from any of Salinger's unpublished letters for the remainder of the reclusive author's life and for the statutory fifty years following Salinger's death. Judge Newman explained: "Public awareness of the expressive content of the letters will have to await either Salinger's decision to publish or the expiration of his copyright." Without even discussing the important First Amendment issues raised by the issuance of an injunction against the publication of a serious biography—the Court does not explain, for example, why the less draconian remedy of monetary damages available under the Copyright Act would not have been an adequate and preferable alternative to prior restraint—the Court of Appeals in *Salinger* concluded: "If [the biographer] copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined." The curious concept of serious biographers "deserv[ing] to be enjoined" is certainly troubling from a First Amendment—and, I would submit, Copyright Act—perspective.

3. *New Era Publications v. Henry Holt*

In *New Era Publications v. Henry Holt*, a panel of the Second Circuit found another serious biographer who, but for the fortuitous operation of the *laches* doctrine, "deserve[d] to be enjoined." L. Ron Hubbard, the controversial founder of the Church of Scientology, is the subject of a highly critical biography published by Henry Holt and Company entitled *Bare-Faced Messiah: The True Story of L. Ron Hubbard*. Hubbard's biographer uses excerpts from Hubbard's unpublished diaries and journals to refute the public image of Hubbard promoted by the Church of Scientology and to illustrate perceived flaws in Hubbard's character.

District Court Judge Leval—who wryly observed during his New York University speech that "[i]t has been exhilarating to find myself present at the cutting edge of the law, even though in the role of the salami"—found most of the biographer's uses of Hubbard's unpublished materials to be "justified by a compelling fair use purpose—a purpose which reasonably requires use of the author's particular words to demonstrate the validity of an important critical point." For example, the biographer's quotation of Hubbard's revealing, previously unpublished, statement that "The trouble with China is there are too many Chinks here" was deemed by Judge Leval to be essential in order to substantiate the author's critical opinions about Hubbard's bigotry. However, in view of the Second Circuit's restrictive *Salinger* decision, Judge Leval reluctantly held that the biography infringed Hubbard's copyright "to some degree," finding "that there is a body of material of small, but more than negligible size, which, given the strong presumption against fair use of unpublished material, cannot be held to pass the fair use test."

As Judge Leval explained, "The abhorrence of the First Amendment to prior restraint is so powerful a force in shaping so many areas of our law it would be anomalous to presume casually its appropriateness for all cases of copyright infringement."

Notwithstanding his copyright infringement finding, Judge Leval refused to issue a permanent injunction against the publication of the Hubbard biography. While recognizing that "it has become commonplace in copyright cases to assume [irreparable] injury" and to issue injunctions to prevent infringement, Judge Leval questioned "whether a finding of infringement should ritualistically call forth an injunction." As Floyd Abrams observed in an important 1987 speech on "First Amendment and Copyright" cited by Judge Leval: "[Courts assessing requests for injunctions in copyright cases] should remember—and the First Amendment should help them remember—that enjoining publication of a book is serious and that ritualistic incantation of the availability of injunctions in copyright cases makes it no less serious." Concluding that an injunction would cause "significant" injury to freedom of speech and that monetary damages would adequately compensate the holder of Hubbard's copyrights, Judge Leval refused to enjoin the Hubbard biography. As Judge Leval explained: "The abhorrence of the First Amendment to prior restraint is so powerful a force in shaping so many areas of our law it would be anomalous to presume casually its appropriateness for all cases of copyright infringement."

The Second Circuit panel affirmed Judge Leval's denial of an injunction solely because of the plaintiff's "unreasonable and inexcusable delay in bringing the action." The Court of Appeals' opinion (written by Judge Roger J. Miner) makes it abundantly clear, however, that the Second Circuit panel would have had no problem in permanently enjoining the publication of the Hubbard biography absent the *laches* problem. (Indeed, Judge Leval was asked to consider a motion, subsequently withdrawn, filed by the holder of Hubbard's copyrights which sought to "buy out" this *laches* problem by paying Holt's pre-lawsuit damages, thereby attempting to force Judge

Leval to issue an injunction in light of the Second Circuit's opinion.) Observing that "we disagree with a great deal of what is said in the [district court's] opinion"—surely one of the great judicial understatements in recent memory—the Court of Appeals panel in *New Era* explained:

> Although we would characterize the use here as more than 'small,' it makes no difference insofar as entitlement to injunctive relief is concerned. Since the copying of 'more than minimal amounts' of unpublished expressive material calls for an injunction barring the unauthorized use . . . the consequences of the district court's findings seem obvious.

The Second Circuit panel found especially troublesome Judge Leval's express reliance upon the First Amendment in refusing to enjoin the Hubbard biography:

> [T]he district court denied an injunction for several reasons, one being the existence of special circumstances in which free speech interests were said to outweigh the interests of the copyright owner. We are not persuaded, however, that any first amendment concerns not accommodated by the Copyright Act are implicated in this action.

In a separate concurring opinion, Chief Judge James L. Oakes sharply criticized Judge Miner's opinion, characterizing it as unnecessary "*dictum* [which] tends to cast in concrete" the *Salinger* decision. "I do think that *Harper & Row*, as glossed by *Salinger*, leads to the inevitable conclusion that all copying from unpublished work is *per se* infringement." Disagreeing strongly with the majority's view that copyright protection for an unpublished work "follows as of course," Judge Oakes observed:

> *Salinger's* language, as here applied, confines the concept of fair use and prevents necessary flexibility in fashioning equitable remedies in copyright cases. I thought that *Salinger* might by being taken literally in another factual context come back to haunt us. This case realizes that concern.

With respect to "the truly critical question" of the propriety of injunctive relief, Judge Oakes took strong exception to the majority's willingness to enjoin serious biographers who make unauthorized use of unpublished materials. Noting the preference from a First Amendment viewpoint of monetary damages to injunctive relief and citing "the public benefit in encouraging the development of historical and biographical works and their public distribution," Judge Oakes concluded:

> Enjoining publication of a book is not to be done lightly. The power to enjoin . . . must be exercised with a delicate consideration of all the consequences . . . . Responsible biographers and historians constantly use primary sources, letters, diaries, and memoranda. Indeed, it would be irresponsible to ignore such sources of information.

On August 29, 1989, the Second Circuit denied the "unprecedented" petition for rehearing *en banc* filed by Henry Holt (which was the prevailing party on the appeal by reason of the panel's *laches* ruling). In so ruling, the Second Circuit issued two openly hostile opinions written by Circuit Judges Miner and Newman which further underscore the extraordinary confusion and divisiveness surrounding the Second Circuit's recent copyright jurisprudence. As Floyd Abrams aptly observed when the rehearing denial opinions were issued: "The opinions make clear that not only are the issues an open question, but an open wound." Thus, Judge Miner, concurring in the Second Circuit's decision to deny a rehearing, took strong exception to Judge Newman's attempt in dissent "to allay . . . misunderstanding" purportedly created by the panel's majority decision in the *New Era* case. "[W]hether or not 'this Circuit is committed to the language of the panel opinion,' it surely is not committed to the language of the appended dissenting opinion," Judge Miner derisively observed. Contending that the panel's majority opinion was "consistent with settled law and leaves no room for misunderstanding" and reiterating his belief that "fair use is never to be liberally applied to unpublished copyrighted material," Judge Miner maintained his opinion that an injunction would have been a proper remedy in the *New Era* case but for the *laches* problem.

Judge Newman vigorously dissented from the Second Circuit's denial of a rehearing in order "to avoid misunderstanding on the part of authors and publishers as to the copyright law of this Circuit . . . ." Claiming that the Second Circuit's denial of a rehearing "does not mean that this Circuit is committed to the language of the panel opinion that has created the risk of misunderstanding," Judge Newman attempted to interpret—and limit—the broad scope of the *New Era* panel's troublesome majority opinion. Thus, Judge Newman boldly concluded that "we do not believe that biographers and journalists need be apprehensive that this Circuit has ruled against their right to report facts contained in unpublished writings, even if some brief quotation of expressive content is necessary to report those facts accurately." Given the panel's unambiguous finding of infringement in the *New Era* case and the obvious substantive disagreements among the Judges within the Second Circuit, it will be exceedingly difficult for authors, publishers, and their lawyers to share Judge Newman's confidence with respect to this critical issue. Similarly, Judge Newman's attempt to rewrite portions of the panel's majority opinion in *New Era* dealing with the propriety of injunctive relief—which opinion Judge Newman conceded "can be read to suggest that once infringement has been found, the remedy of an injunction follows as of course"—is also unpersuasive, especially in view of what Judges Miner and Newman now agree to be an "infelicitous" statement by Judge Newman in *Salinger* that biographers who copy more than minimal amounts of unpublished materials "deserve to be enjoined."

Conclusion

Biographers who quote selective excerpts from unpublished works in order to substantiate their findings or opinions should not be treated by courts as unwanted—and unlawful—intruders upon the property rights of copyright owners. While literary freeloading should certainly be discouraged, and where appropriate, penalized under the Copyright Act, stronger recognition should be accorded by the courts in copyright infringement cases to the significant educational role that biographers play. The "fair use" doctrine must be flexible enough to permit serious biographers to utilize limited amounts of unpublished materials without having to obtain the consent of the copyright owner. As Judge Leval reminds us—and as the Second Circuit in the *Salinger* and *New Era* cases seemingly has forgotten: "To quote is not necessarily stealing. Quotation can be vital to the fulfillment of the public enriching goals of copyright law."

In the event a court, after giving proper weight to the strong societal interest in a biographer's work-product, nevertheless finds that a biographer has infringed a copyright owner's unpublished form of expression, I believe injunctive relief should be utilized sparingly and only as the remedy of last resort under the Copyright Act. The Second Circuit's rigid formula in the *Salinger* and *New Era* cases virtually requiring the issuance of an injunction following a finding of copyright infringement is in direct conflict not only with the discretionary language of the Copyright Act—which provides only that "Any court . . . *may* . . . grant temporary and final injunctions"—but, more importantly, with the underlying policies of the Copyright Act. The permanent suppression of biographies utilizing selective excerpts from unpublished materials—excerpts which, in many instances, may otherwise never be disseminated—is inconsistent with the educational underpinnings of copyright law and with the rights biographers should enjoy as authors under the Copyright Act.

Moreover, a "fair use" doctrine and a Copyright Act truly sensitive to First Amendment values should not permit prior restraints to be issued routinely upon findings of copyright infringement. The inherent tensions between the literary property rights granted under the Copyright Act and the broad expressive freedoms protected under the First Amendment are only exacerbated by the automatic issuance of injunctions in copyright infringement cases. Judicial claims that First Amendment values are already accommodated within the Copyright Act's "fair use" and idea/expression dichotomy doctrines and therefore need not be considered independently in deciding upon an appropriate copyright infringement remedy ring hollow in the wake of the seemingly routine issuance of injunctions in recent cases. If prior restraint is generally impermissible in areas of the law as disparate—and as important—as libel, national security and fair trial/free speech disputes, it is difficult as a matter of Constitutional law and policy to justify such a drastic remedy becoming routine in copyright infringement litigations, especially in view of the availability of monetary damages under the Copyright Act as a satisfactory and clearly preferable remedial alternative.

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Mr. HUGHES. What is the legislation designed to achieve? Is it to restore the law to what was prior to *Salinger* and *New Era?* What is the purpose?

Mr. Morril.

Mr. MORRIL. I think, Mr. Chairman, that it is to restore the law to the state that it was in the day after the Supreme Court's decision in *Harper & Row* v. *Nation.* I think that the compromise language that you have before you quotes the Supreme Court decision very closely, and particularly in its reference to the fact that the unpublished nature of the work is an important element, weighing against the finding of fair use—tending to weigh against the finding of fair use in most of these instances.

There is one further point I would like to add after all of the speakers. The panel has before it today really very important copyright holders. We are really the constituency that believes in copyright.

This legislation is limited. It takes into account those interests, but it also takes into account the other side of the balance.

Thank you.

Mr. HUGHES. Both you, Mr. Vittor, and also you, Mr. Morril, alluded to a recent decision in the second circuit written by Judge John Walker, which pretty much tracked the essence of the legislation before us today in that decision.

I believe, Mr. Vittor, you expressed a hope that the circuit would affirm that decision. What are the prospects that the courts will rectify this and make it unnecessary for the Congress, perhaps, to step in, contrary to the suggestion of Chief Judge Oakes?

Mr. Vittor.

Mr. VITTOR. Thank you, Mr. Chairman. I believe you are referring to the *Wright* v. *Warner Books* case, which I believe was argued last Friday.

Our concern is that that case may be limited to its unique facts and an affirmance of the district court's ruling in that case will not solve the overriding problems of *Salinger* and *New Era.* So we do not believe the piecemeal solution approach, which has been suggested by some of the judges on the second circuit, will provide us with an adequate remedy. In fact, it does not provide a practical remedy for magazine publishers in particular. It is not practical for us to go to court to solve a problem before we publish.

But in direct answer to your question, I do not believe it would solve the problem.

Mr. MORRIL. I agree with Mr. Vittor. I believe the *Wright* case, even if affirmed—and we certainly hope it will be—is unlikely to really change the law. If you read the district court's decision in the *Wright* case, the facts are extremely narrow and there are a number of very negative implications in that district court decision as to what the ruling would be if the facts were even a little bit different.

Mr. ABRAMS. For what it is worth, Mr. Chairman, I attended the oral argument in the case. While I would not come to Congress and ask you to enact legislation based on how an oral argument seemed to go, there was no interest expressed by any members of the panel in the case on the issues we have spoken of today.

They were quite properly fact oriented. They quite understandably took as a given the validity of the *Salinger* and *New Era* cases. There was nothing that occurred there which would even suggest any broader rethinking on their part.

Mr. HUGHES. Ms. Marton, do you have anything you would like to contribute?

Ms. MARTON. Well, I think I made my—or attempted to make my point as forcefully as I could.

In effect, all of us writers are now in a holding pattern. It is a very bad climate; and writing is a pretty grim occupation in the best of times, but when you have no assurance that the work that you have undertaken will ever see the light of day, that is very debilitating. And to actually have to withhold materials is to work with one hand tied behind your back.

I think that is doing, as I attempted to point out, the public a huge injustice.

Mr. HUGHES. The gentleman from California.

Mr. MOORHEAD. Thank you.

I have a legal question that I would like to ask that was brought up last year by the former Register of Copyrights. I wonder whether these top lawyers here in the industry could answer it. She raised the issue of retroactivity, stating that, assuming the decisions that have produced the controversy represent the law, at least in the second circuit, and that the bills are intended to cut back copyright owners' rights with respect to all types of uses of all types of unpublished works, the question of legislative taking without due process will inevitably rise.

I would be interested in your thoughts with respect to the issue of retroactivity. Mr. Vittor, do you want to start?

Mr. VITTOR. Thank you, Representative Moorhead.

Our position is that this is simply a clarification of the law. It is bringing the law back to where it was after *Harper & Row*. We believe that the law should be retroactive, because we are not changing the law. We are simply bringing it back to the way it has been for the past 200 years. So there is no substantial taking here.

People who have unpublished documents that were written prior to 1984 would be governed by *Harper & Row,* and they would be governed by this legislation.

If the law was not retroactive, it would have no practical impact on the advice you hear lawyers giving today. We would still have to say that the great majority of unpublished works written prior to the date of this proposed legislation would be off limits. So it would not solve the practical problems we are addressing today.

Mr. MORRIL. I agree with Mr. Vittor, but I also think the subject of retroactivity is a very serious one that probably deserves more indepth examination than we can give you in response to a question. We will make a separate submission on it.

[The information appears in the appendixes in separate correspondences from Messrs. Abrams, Morril, and Vittor.]

Mr. MORRIL. I would be very concerned if the legislation did not apply to unpublished works which have already been written and books in the pipeline, because the administration of the rule would be virtually impossible. We wouldn't know when the author had read the unpublished works, we wouldn't know when the particular sentence at issue was written, and it would make a very difficult situation for us.

But I would like to come back in more detail on the subject.

Mr. ABRAMS. I am almost tempted to say, I want to submit something in writing to you later on.

Mr. HUGHES. The record will remain open, so you can submit some additional remarks on the subject.

[The letter from Mr. Abrams appears in the appendixes.]

Mr. ABRAMS. My initial reaction is that it proposes no more of a taking problem than would the second circuit itself, if it said, "we went too far, we got out of line with *Harper & Row,* we are going to proceed now as we should have before." It seems to me as a legal matter, the fact that Congress does it rather than the second circuit may be—indeed—a necessity, but doesn't make it any more a taking.

Mr. MOORHEAD. In the opinion of members of the panel, is the current proposal embodied in title I of H.R. 2372 consistent with our obligations under the Berne Convention?

Mr. ABRAMS. I briefed that as best I could in preparation for my testimony last July on this issue. At that time, I thought—and I continue to think now—that it is entirely consistent with our obligations under the Berne Convention for a number of reasons, not all of which I remember now.

But at least two of them were that the Berne Convention does not supersede domestic law and that what we are talking about here is at one and the same time terribly important, but also tinkering around the edges.

If Berne Convention prevents fair use at all, and at least the testimony of one scholar last year might have led to that conclusion, then the Copyright Act itself as it currently exists under *New Era* and under *Salinger* is out of whack with Berne already. I don't think this makes it any worse and I don't think it violates Berne.

Mr. MOORHEAD. We have a vote that is going on on the floor, and my 5 minutes are quite up. I think we have to hustle over there.

Mr. HUGHES. Why don't we break now? We will come back in 10 minutes and finish your examination.

The committee stands in recess for 10 minutes.

[Recess.]

Mr. HUGHES. The subcommittee will come to order.

The gentleman from California has some time remaining.

Mr. MOORHEAD. In a letter to the subcommittee last year, Prof. Jane Ginsberg wrote, "Even if all Congress intended to make clear was that a work's unpublished status does not necessarily lead to its fair use, any individual judge could declare otherwise. As a result, one could conclude that either the bill is gratuitous or the Congress must have meant something more."

How would you respond to this point raised by Professor Ginsberg? Who wants to volunteer?

Mr. ABRAMS. I would like to try that, since Professor Ginsberg and I wrote on opposite sides of the *Harper & Row* case, and I think we both remember arguments like this coming up in that case.

First, it is perfectly true for her to say that the courts do not say that this is an absolute bar. Indeed, they sometimes say it is not an absolute bar. But there is a music to judicial decisions as well as words. We know what we know. We know what wins and what loses. We know the legal standards that a court says it is applying in a particular case will have economic impact in a later case. We know that what the second circuit has told us again and again now is that even a small amount of material used from an unpublished work will at least ordinarily not pass muster in terms of being deemed fair use. We know they have compressed what should be a four-part analysis into what basically is a one-part analysis.

We have tried, I think, those of us testifying today, to be careful in not saying that this is a per se rule. We have used the phrase "virtually a per se rule," precisely because I can imagine the second circuit saying in some circumstance that if it is two words out of some innocuous document, that that is not what they mean.

But what they have done in practice, the rule of law they have imposed on us and the rule of life that we have to live with now, is one which says that any of our clients are at enormous peril if they publish anything that is deemed unpublished.

Mr. MOORHEAD. Does anyone wish to add to that?

Mr. VITTOR. I would just like to echo the statement of Mr. Abrams. What we would say to Professor Ginsberg is that we are simply asking through this proposed legislation for the courts to go back to *Harper & Row,* properly understood. She is entirely correct that the courts have made noises to the effect that there is no per se rule. But the effect of their decisions is to create a virtual per se rule. We are simply asking the courts to go back to *Harper & Row,* properly understood, and to make these cases close cases.

One of the problems with the *Salinger* and *New Era* cases is that they should have been close cases where the analysis of the four factors leads to delicate balancing. Instead, we find the second circuit decisions to be easy decisions. They find it is unpublished, therefore you can't use it, and the injunction follows.

We want to go back to *Harper & Row,* properly understood.

Mr. MOORHEAD. Was that case taken on appeal to the Supreme Court? I know they didn't accept certiorari on it, but there was an attempt to take it to the Supreme Court?

Mr. VITTOR. Yes. The Supreme Court has refused to take the second circuit cases.

Mr. MOORHEAD. My last question is this. I know the answer to this, too, I believe, but I think it should be in the record. Why can't a journalist simply characterize a source document instead of quoting directly from it?

Ms. MARTON. Well, under present circumstances, that is what journalists are reduced to doing, which I think is a very irresponsible condition to operate under.

I mean, the whole idea of good journalism is to go to the source and to get as many valid documents to back you up as you possibly can. This present situation encourages sloppy journalism, which is not to have firsthand knowledge—firsthand fact, but secondhand and thirdhand. I mean, that is what the present circumstance reduces us to. It really is detrimental to the practice of first-rate investigative journalism.

We are going to have an awful lot of Deep Throats in our future—that is, unattributed, unnamed sources—to wiggle out of sticky court cases.

Mr. ABRAMS. We are also going to have a situation in which the public can't pass judgment for itself on the validity of charges made. If you can't quote from the source, if you have to paraphrase down to a euphemistic, bland level, if you have to have just conclusions without the raw meat which leads you to your conclusion, the reader has no way of determining if the author knows what he or she is talking about.

Mr. VITTOR. I would like to follow up on that point. There is a wonderful anecdote coming out of the *Salinger* case. All the excerpts from Salinger's letters were removed, the book was published, and a reviewer criticized the author for the author's conclusions regarding the letters that were no longer in the book.

The author is left defenseless because he can't quote the letters, the court ordered them deleted from the book, and the reader is left totally in the dark with no way to evaluate whether the biographer has a valid or invalid opinion of Mr. Salinger.

We are leaving our readers no way of determining whether the journalist has a valid basis for concluding something about the subject or not.

Mr. HUGHES. The gentleman from Kansas.

Mr. GLICKMAN. Thank you, Mr. Chairman.

I think this is an important issue, and the bill does address some serious problems that would cause a lot of scholarship to atrophy in this country. So I do intend to support it.

I want to raise some questions, however, about the issue of privacy, because it seems to me the issues involved with the fair use doctrine basically have to do with the economic interests of, as you call them, the widow's rights, or the people who have ownership, over published documents and other kinds of things.

But let's say once I leave the House I give all my papers to my local university, Wichita State University, under the proviso that the material is not to be ever looked at or not for 50 years. Because we know how valuable my papers are, people will be clamoring to look at them.

Let's say I make an agreement with the university on those kinds of limitations, and also limitations on use. And let's say I am a stickler for privacy. It has nothing to do with economic issues. I just don't want people in my private life, looking at how I wrote my letters or anything like that.

Is that relevant to the discussion today? And if so, is that part of a judge's decision under the Hughes-Moorhead bill in determining fair use?

Mr. MORRIS. I think I can answer that as a lawyer by saying yes and no. I think it is important to recognize what this legislation does not do as much as to recognize what it does do. It is not revolutionary legislation. It doesn't wipe the slate clean. It restores a balancing test that has been developed over literally centuries, codified by the Congress in 1976.

The fair use test has four elements. Some of those elements, particularly factor 4, would be taken into account, would be relevant to the hypothetical you posed. The legislation also does not wipe out all of the other laws and doctrines that exist apart from the copyright law. There are State privacy statutes, there are theft statutes.

Mr. GLICKMAN. So you might have other causes of action at your disposal?

Mr. MORRIL. Yes, or the factors you suggest would be relevant under a full fair use test.

Mr. GLICKMAN. Mr. Abrams, I will get to you in a second, I guess what I am saying is the fair use test as it existed until these court rulings did contemplate the judge would take into account some of the factors I mentioned, without being any more specific than that.

Mr. MORRIL. Absolutely.

Mr. ABRAMS. I think it is more than a matter of controversy among academics about the degree to which privacy should be deemed a factor in a fair use analysis. We don't have a lot of law on that.

What I think is clear is that there is nothing in this law, if you were to adopt it, that provides any greater access than a grantor chooses to give. The bill doesn't deal with that at all. If you close your papers, your papers are closed. If somebody sees your papers, even though they are closed, nothing different has occurred because of this statute. If someone sees your papers, let's say, as in the *Salinger* case, in a university library, which is open to the public, say, the author would always be free, because the copyright law provides no protection in this area at all, to publish facts.

Your ideas, your concepts—these things are not protected by the copyright law which protects only expression. And so to the extent you really want a privacy protection, you would do well not to make it available at all, because a significant degree of privacy is inherently lost once you mail a letter to someone.

Mr. GLICKMAN. Let me give you an example. Let's say that former President Reagan giving his papers to, I don't know what library, his——

Mr. FRANK. His.

Mr. GLICKMAN. His library, and then there are papers to William Casey. He gives all the papers under these terms: you can't use them, you can't see them, and he tries to limit it as much as he can. And Casey writes him and says, "Dear Mr. President, boy, we really pulled a fast one, we really got those hostages out and Carter never knew the difference." And on the bottom Reagan writes, "Dear Bill, we did a great job, didn't we? Your friend, Ron."

I say to my Republican friends, I don't know if this is true or not, but let's just say hypothetically and there are all sorts of philosophical perspectives on there. The papers are filed in the library under very severe restrictions, and either illegally or legally, according to whatever the restrictions are, somebody grabs that, looks at it.

Is that a fact or an expression, what we just saw, and is that the kind of thing because it is such a profound public issue, the judge would say, the fair use doctrine would be more inclined to let it out?

Mr. ABRAMS. I would say two things about it. First, the example which is better than any that I gave in my testimony is one which shows the problem that we are here to talk about today. The copyright law does not protect, as I said a moment ago, against anyone publishing an article saying Reagan and Casey conspired, they agreed to do this, they wrote letters to each other saying that. But unless there is some fair use protection, one couldn't quote at all from those letters.

One would have to simply phrase it in a sort of general way in which the author, playing an omniscient role, would be saying I know that these two people had this correspondence, and if you had seen it, you would know, too, what I know.

Mr. GLICKMAN. That would clearly shred his credibility in describing it that way.

Mr. ABRAMS. Absolutely. The other thing I would say is that at some point the words you have not heard from this panel yet would likely be spoken, and those are the words "first amendment." In a situation like that, if fair use didn't protect, I think that a very serious argument could be made that the the heavy guns of the first amendment could be brought into play. The law is not very clear on that either, but the case is a perfect example of a situation where if fair use didn't permit it to be published, I would argue, at least, either that or the absence of fair use is unconstitutional under the first amendment, or that the first amendment must be read to provide some ability to offer quotations like that.

Mr. VITTOR. I would just like to add one comment. Your excellent hypothetical, and it is better than any of the ones we have given you, illustrates another problem with bringing privacy concepts into the copyright law.

Under privacy laws, you do not have a right of privacy following your death. So assuming the heirs of Mr. Casey tried to prevent publication of that letter, they would have no right of privacy on his behalf or on their behalf. Yet by importing privacy concepts into the copyright law, what you do is create the "widow censor," where life plus 50 years of privacy are incorporated into the Copyright Act.

There is another problem with two inconsistent doctrines, privacy on the one hand and copyright, which as Mr. Abrams points out, doesn't protect the facts at all. So Mr. Casey's privacy rights with respect to the facts would go unprotected.

Mr. HUGHES. Suppose the document in question, the Casey to Reagan document, is a public document? Would it make any difference?

Mr. VITTOR. I was going to point out, if you mean by public that it is a government record, there would be no copyright claim because there is no copyright interest in Mr. Casey's estate in a government document. I was assuming it was a private letter.

Mr. HUGHES. Suppose it was written at the CIA on official stationery.

Mr. VITTOR. I think there is a good argument that it is not Mr. Casey's copyright. That is a routine argument heard in the courts.

Mr. GLICKMAN. Obviously, the libel laws treat public officials and nonpublic officials differently. Does this have any relevance whatsoever in the fair use concept?

Mr. MORRIL. You hear a loud silence as we all think about that. I think that although there is nothing within the four corners of the four prongs of fair use which deals with public officials or private officials, that when you talk about concepts such as the nature of the work, which is one of the four factors, that it might make some difference that it is a biography of the President of the United States. But as a general matter, as I think of it, I think the answer is no, that fair use—well, let me start again.

It is a good question. I think what all of us have been pleading for today is to send the judges back with their four factors again, and not one. And to free them again to approach this in a nonrigid, nonwooden way of the sort that the second circuit has, in my view, locked them in.

I think that there likely would be a way, on reflection, to take account of the fact that a biography is of a public figure. But I can tell you there is very little law on that at this point.

Ms. MARTON. As an illustration of the difference between the private and public domain, when I was researching my biography of Raoul Wallenberg, I came across a letter drafted for Secretary of State Henry Kissinger, that is, over his signature, in which Kissinger calls at Wallenberg's mother's behest, calls upon Andrei Gromyko to finally come clean on the subject of Wallenberg, and it is a very urgent letter saying, "Let us deal with this case promptly and be done with it."

And in the margin I noticed, handwritten, "Do not send, H.K." So obviously Kissinger had vetoed the sending of this absolutely crucial letter. And I published this letter, much to Mr. Kissinger's displeasure, in my book. But as it was drafted on State Department stationery, he had no recourse. It became part of the public domain. So even under present circumstances, even under fair use as it now stands, there is that protection for an author such as myself to use public materials.

Mr. MORRIL. I think the fair use test would permit the courts to take into account the public-private figure concept in a number of the factors in weighing in different directions in different csaes. For example, if a public figure is involved, the court might determine there was a greater potential value under factor 4, and that tends to weigh against the finding of fair use.

But I think it is important to remember, as Taylor Branch testified last year, that a lot of the materials we are talking about really come from obscure people, people who frequently can't be found when you are in the manuscript review process, but somehow miraculously appear after publication and have a problem. So we have some serious logistical problems.

Mr. HUGHES. The gentleman from Massachusetts.

Mr. FRANK. I am going to be following up on Mr. Glickman's questions. I thought they were very well phrased. I begin by apologizing to my colleagues on the panel because I have been away from this subcommittee for some time so some of my questions may be a little elementary, although some of it has been elucidated with what you said here.

On the privacy issue, I think it is important to kind of separate the matter. I am completely for restoration of the fair use doctrine. As far as I am concerned, if a work is intended to be published, there is no problem at all, but I am concerned about things which somebody may have committed to paper or computer screen never intending them to be published. I do separate that.

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I appreciate your point that copyright survives you and your privacy right doesn't. That is one of the nice things about being in the Congress instead of the court. Unlike the rest of it, it stops when you are dead. That is not a hard one to draft. We are capable of separating it out. But I do want to pursue the privacy issue.

You said the method of acquisition is relevant. If you put something in a library and people write about it, my question is, what the hell did you put it in the library for? The library is not your bedroom. It does seem to me you have waived your privacy right, unless you put it in the library under seal.

What happens, though, if somebody gets illegal access to something that I have written that I didn't want anyone else to read or I wanted one other person to read? What is my recourse?

Mr. ABRAMS. Let me say first, I just have to say that there is a difference in the academic community about this. Judge Levale, for example, is of the view that that should have nothing to do, nothing, with the consideration of a court under the copyright law. I am not prepared to say that that is the law at this time, that is to say, I am not yet prepared to say that he is right.

Mr. FRANK. From the standpoint of someone who wanted that to be a factor, the best you could say is that the law is unclear?

Mr. ABRAMS. I would say it is unclear, except that we should remember that when we talk about fair use there is at least a body of caselaw which indicates that there is some equitable play for the court interpreting what is "fair."

Mr. FRANK. That is really what we were talking about. I think you have said to Mr. Glickman, changing this doesn't change the doctrine, except it changes it in this case. If the guy can't publish it, I am protected.

I would tell you my own interest is in quarrying out privacy protections for people who have put something in writing. If you are careful about it and you control it, putting it in the library is a very different situation, because you mentioned a journal. If somebody keeps a journal and somebody breaks in the house and gets the journal, I think you ought to have absolute protection against that being printed.

Right now the fair use doctrine as it has been restrictively interpreted, is a blunderbuss. I would suggest that be changed into a more sharply firing instrument.

Mr. ABRAMS. Suppose one were to take Representative Glickman's hypothetical as applied to your question. Suppose someone were to come upon or indeed steal——

Mr. FRANK. Come upon and steal are very different. Let's say steal.

Mr. ABRAMS. If someone were to steal a diary and the diary is the very diary showing the secret Reagan-Casey relationship——

Mr. FRANK. Here is where your first amendment issues would come in. When you talk about the first amendment, some people argue the first amendment applies to any written expression. You were talking about a set of cases that would have greater public performance than the norm.

Mr. ABRAMS. That is correct.

Mr. FRANK. I am prepared to say there is a first amendment public purpose type of exception. I am also prepared to say, steal it, print it, and let them come sue you. If I am the guy who steals the document that says Casey did it, and I publish it, and I technically do it illegally, good luck in getting your jury to convict me. So I would concede that. But before I can concede to you the first amendment protection, I need to know whether you can afford a principle by which there is a protection.

Ms. **Marton**. I think we have to emphasize again that we are not concerned here with Mr. Casey's home life. We are concerned about the sort of biographies, histories, and books of nonfiction are about, in the public domain.

Mr. **Frank**. The press does not get involved from time to time in people's lives. I suppose your experience sometimes shapes you. But what if we are talking not about public matters or about an author. J.D. Salinger never aspired to make public policy. He was an important literary figure. And the fact that an exception exists will mean there will be a penumbra of ambiguity. But what about personal things of important people or just personal things of literary people or other people?

Mr. **Abrams**. The first place I would look for protection is as to the criminal law. If somebody steals something, he or she should go to jail.

Mr. **Frank**. The journal has to have real value.

Mr. **Abrams**. A person who steals also commits a variety of torts in the act of stealing, and the person stolen from would presumably have an——

Mr. **Frank**. But none of those would allow an injunction against publishers.

Mr. **Hughes**. Let's move away from stealing and go to a family that is split, and let's say that some members of the family want to protect certain things about the integrity of that individual, and the members of the family have an ax to grind.

In that instance, what are the privacy considerations?

Mr. **Abrams**. We just had a number of books about the Bingham family in Louisville. A great newspaper family, split right down the middle, sold its newspaper, with enormous impact on American journalism and potential readers of that newspaper.

My view would be that fair use principles ought to be applied with respect to the letters written to and from the individuals in that family. I wouldn't disagree with the notion that some level of equitable principles have already been held to be embodied in the fair use doctrine.

For example, one of the things that you have all heard as we keep coming back to the *Harper & Row* case is that although we may mean something different than the second circuit means when we talk about restoring law to the situation after the *Harper & Row* case, one of the things that is clear from that case is that the court took into account and weighed heavily against the Nation the fact that the Nation was engaged in what Justice O'Connor believed was "privacy."

Mr. **Frank**. Can we put that in the statute?

Mr. **Abrams**. No, please.

Mr. **Frank**. Why not? Legislation is not literary criticism. Redundancy is almost never a reason that anybody really means when they say don't do it. Nobody ever says, well, that will be four extra lines, you use up all that paper, let's not do it. You have to tell me why you don't want to do it.

Mr. ABRAMS. You are right. I didn't mean it. Fair use as historically defined, *Harper & Row* is only one example, has taken into account certain factors which are equitable factors. I am very concerned about your——

Mr. FRANK. We are here as a legislative body to make public policy. As far as the *Harper & Row* case, I have no sympathy with that decision, because that was going to be published. That doesn't worry me at all, the fact that they published it. I don't think any harm was done. But I want to know as a policy matter, why shouldn't we put a very heavy presumption against your publishing something that was written or put in a computer by someone who had a reasonable expectation of privacy and it was gotten hold of other than legitimately.

Mr. ABRAMS. I don't think that has anything to do with the copyright law. In the discussion itself, it says the purpose of the Copyright Act is to further the arts and sciences, and I think that a Copyright Act which starts to move that far away from protecting the creative process into protecting an entirely different interest, that of privacy, at least to the degree that any new language presumably would, or heavy presumption presumably would, would not only deviate from the purpose constitutionally construed, and I think properly construed, of the Copyright Act, but lead the courts more and more into making essentially moralistic judgments in this area. Now I said already that the courts take account of certain equitable factors.

I didn't mean to suggest that they sit in judgment or that they ought to sit in judgment about the propriety, the bona fides of why the journalist wants to print it or anything like that.

Mr. FRANK. I am not talking about the bona fides. I don't care what the journalist wants, fame, money. I am talking about the method of acquisition.

Mr. ABRAMS. I think the method of acquisition ought to be dealt with in other ways than the Copyright Act. I don't know what that has to do with copyright.

Mr. FRANK. The way the copyright law is currently being interpreted, it serves that purpose. You are asking us to make changes in the law, most of which I am sympathetic to, but which would have the effect of weakening that. I would feel more comfortable doing that if I find another way to provide it. It protects, I understand that. What about a Federal privacy statute of that sort?

Mr. ABRAMS. I don't want to bow out of this discussion, but I really want to know what that privacy statute would say, or even—what the core principle is. If the core principle is that if you put something in words, you commit something to writing, and you had a reasonable expectation of it being private, that if someone gets that illegitimately, he or she can be enjoined from sharing it with people you didn't want them to share it with, even with the first amendment exception——

Mr. FRANK. Do you think that violates the first amendment? If I write a diary and I keep it in my house, and somebody breaks in and steals it——

Mr. ABRAMS. Sure, you can make stealing criminal.

Mr. **FRANK**. Making criminal doesn't enjoin the publication.

Mr. **ABRAMS**. Once you start saying, presumably the law would not only ban the thief or whatever, but the journalist who gets it next, to make the law work to serve its purpose.

Mr. **FRANK**. Not necessarily. What about if we catch the thief? At some point you lose it, but—i want to know what the principle is.

Mr. **ABRAMS**. A law barring a thief from profiting, as it were, and using——

Mr. **FRANK**. That is not the purpose. It is not profiting. It is saying, you stole it from me, I had an expectation of privacy, and you can't take it and publish it. It could be computer hackers that get material and publish it.

Mr. **ABRAMS**. I would like to write to the committee and respond to that question.

[The letter from Mr. Abrams appears in the appendixes.]

Mr. **FRANK**. Thank you, Mr. Chairman.

Mr. **HUGHES**. I have a couple of followup questions. First, it just appears to me that the guidelines set forth in the statute in section 107 don't particularly lend themselves very well to addressing some of the questions we have raised.

I mean, No. 4, for instance, which deals with economic impact. We are talking about perhaps personal decisions not to publish, never intending to publish. Would you disagree with that?

Mr. **ABRAMS**. I agree with that.

Mr. **HUGHES**. Also, should it make any difference if the published work is not one that appears to be science or the useful arts, language which basically is set out in the Constitution? For example, should lawyers be permitted to assert copyright of unpublished principles for discovery motion for business records?

Mr. **VITTOR**. If I can respond, that is exactly what is happening. There is a new trend in the law where companies are asserting copyright interests to prevent dissemination of court documents.

We have seen it in a product liability case where a drug manufacturer copyrighted documents that were filed in the discovery proceedings to prevent—the purpose was to prevent the dissemination of the court documents. Here we have the copyright law being used to prevent dissemination of critical public information about a product liability case.

Mr. **HUGHES**. Let me take it a step further. We had a little discussion this morning with the staff preparing for the hearing, and I raised the question of confessions of a defendant. Number one, who is the author of this? The chief detective who is leading the parade; it is his form and content, he is eliciting the answers. Who is the author? Should that be copyrightable?

Mr. **VITTOR**. Again, as soon as the pen hits the paper, it is copyrighted as an unpublished document under the present Copyright Act. Under the line of cases we are talking about, we could not quote that confession unless it is permitted by the copyright owner.

Mr. **HUGHES**. When the defendant becomes the owner and basically is able to deny the use of a court confession, that is interesting.

Mr. **VITTOR**. Court documents are unpublished documents, and that is one of the problems with the *Salinger* and *New Era* cases. I think your proposed legislation fixes that. It allows us to make selective, limited use of documents such as those that are unpublished and lets courts, using the flexible, four-factor analysis, decide whether we have done it properly.

Mr. MORRIL. I agree with that. What we really need to do is put a lot of these matters back into the hands of the court. I think the range of questions illustrates that you really can't legislate for every situation that has arisen or is likely to arise. That is why I assume that Congress didn't do it in the 1976 act, and it has never been done previously. Congress set out a four-factor analysis that permits a court to do it in the myriad of cases that come before it.

I would not, by the way, take very much comfort from the prospect of a first amendment exemption overriding the analysis in the Supreme Court case. The second circuit, I believe, in both *Salinger* and *New Era* said that the Copyright Act takes into account all of the first amendment considerations that should be taken into account in this area.

Mr. HUGHES. I have some other questions.

The gentleman from Massachusetts.

Mr. FRANK. I guess I want to express that general disagreement with the principle, which is again one that I think people are somewhat occasionally in their allegiance to, that we should leave it to the courts. If you didn't leave it to the courts, you wouldn't be here. That is why we are here. And while it is a mistake to try to legislate with such specificity that you decide cases in advance, I think it is entirely our province to say, this factor needs to be given a little more weight.

There is a temptation to mask disagreement with procedural argument. I do think these are legitimately before us and have to be dealt with.

Mr. HUGHES. I have some additional questions which I am going to direct to you in writing. I am not going to take any more time. We have taken a lot of time with this panel. It has been very interesting. We appreciate your contributions. It is a fascinating area of law.

Mr. FRANK. I did just want to compliment Mr. Abrams on his articulate restatement of the doctrine of representing the original intention of the founders.

Mr. ABRAMS. Thank you.

Mr. HUGHES. Thank you very much. You have been very helpful. We appreciate the time you have given us here today.

Mr. HUGHES. Our second panel consists of Mr. James Burger and Mr. William Neukom. Mr. Burger is chief counsel for government and field sales, Apple Computer, Inc. He is a graduate of the New York University School of Law.

Our second panelist is Mr. William Neukom, vice president and general counsel for Microsoft Corp. He is testifying on behalf of the Software Publishers Association. Mr. Neukom was in the general practice of law in Seattle, WA, and he was a graduate of Stanford University School of Law.

We welcome you to the committee hearing today. We have your statements, which, without objection, will be made a part of the record in full. I would like you to summarize.

We will begin with you, Mr. Burger. Welcome.

STATEMENT OF JAMES M. BURGER, CHIEF COUNSEL FOR GOVERNMENT AND FIELD SALES, APPLE COMPUTER, INC.

Mr. BURGER. I am James M. Burger, chief counsel for government and field sales, Apple Computer, Inc.

We support the fair use title of H.R. 2372. First of all, I really want the record to show that we thank you, Mr. Chairman, and also Congressman Moorhead, who isn't here, for your willingness to work with us on this important issue.

When the debate began, we believe the Supreme Court's 1985 *Harper & Row* v. *the Nation* case dealt fairly with questions of fair use of unpublished material. We were concerned that new legislation might open up the fair use doctrine to permit unauthorized copying of unpublished computer programs, unpublished specifications for software under investment, and other confidential plans and materials.

We were certainly willing to cooperate in resolving the concerns raised by the authors and the book and magazine publishers in the *New Era* and *Salinger* decisions. But we couldn't support last year's bills. And to explain our reasoning, it is important for me to explain why unpublished copyrighted material is so important to us.

America's computer hardware and software industry have a competitive lead in the world market. In a report released this past March, the Council on Competitiveness found in a survey of some 23 critical technologies that software was one of the seven such technologies where the United States held the lead. The global software market today is some $70 billion, and some analysts believe that by the year 2000 it will be a trillion-dollar market.

Our products are the world's most sophisticated software products. And American companies receive some 70 percent of that world software revenue. And barring dramatic changes, we will be able to compete successfully in the future as well.

Privacy is the most serious threat to that prospect. In its simplest form, a literal copying of somebody else's program and selling it, is a straightforward legal issue. Nobody in the United States seriously argues that such copying should be made legal.

We do face major problems with such privacy in some foreign countries that have inadequate intellectual property laws or enforcement. In Thailand and China, for example, such piracy is common. And under the special 301, the USTR decided this past April to cite them, and that was a proper thing to do.

But there is a more serious legal challenge that comes from another form of privacy. This involves a process called decompilation in which a pirate copies the object code of a computer program and then proceeds through several iterations to translate that into source code which the pirate can then more readily read and manipulate.

What they then do is alter that work to disguise the copying and produce a second product, a second program which it markets as a "substitute program," at a lower price. The strong copyright protection we now have under U.S. copyright law lets us market our products without the fear of either type of piracy. But some companies which lag behind in the creation of original programming want to catch up by legitimizing decompilation.

Up until now they have failed but last year's proposals to allow a broader use of unpublished works raised some questions about whether competitors would be allowed to copy and imitate unpublished computer programs and other business materials.

We wanted to be sure that when Congress acted to meet the concerns of the authors and book publishers, that it didn't accidentally damage our industry and hurt our companies' ability to compete in the global market. Last year's bills were so broad as to eliminate the distinction between published and unpublished works in determining the scope of fair use. They would have weakened protection not only for works of interest to historians and scholars but for unpublished material of any kind.

By contrast, H.R. 2372 basically restates the three principles enunciated by the Supreme Court in *Harper & Row*. It makes clear that, first, the unpublished nature of a work is important to the overall fair use analysis. Second, that it is weighed against a fair use finding. And third, it does not create a per se rule against finding fair use.

As the legislation states, after a full analysis of all four factors has been undertaken, the fact that a work is unpublished does not bar the finding of fair use. We believe that the bill was a careful compromise. It is acceptable to our industry, and as you have heard this morning, it meets the needs of the authors, book and magazine publishers as well, and we are pleased to support it.

Thank you.

Mr. HUGHES. Thank you, Mr. Burger.

[The prepared statement of Mr. Burger follows:]

PREPARED STATEMENT OF JAMES M. BURGER, CHIEF COUNSEL FOR GOVERNMENT AND FIELD SALES, APPLE COMPUTER, INC.

Good morning. My name is James Burger, and I am the Chief Counsel, Government, for Apple Computer, Incorporated. I am testifying before the Subcommittee today on behalf of the Computer and Business Equipment Manufacturers Association, for whom I chair the Proprietary Rights Committee. CBEMA is a trade association with 26 members. We represent the leading edge of high technology companies in the U.S. computer, business equipment and telecommunications industries. Our members had combined estimated sales of more than $262 billion in 1990, making up about 5% of the U.S. gross national product. CBEMA member companies employed about 1.2 million workers in the United States last year.

I want to start by congratulating the Chairman and the Members on their work on this issue over the past year. I believe you have arrived at language which will satisfy the authors, the book and magazine publishing industries' objections to the present case law on use of unpublished source materials for history and biography, while protecting our industry against copying and use of our unpublished copyrighted material. The computer industry supports the title of the bill dealing with fair use, and we thank you for your willingness to work with us.

Very frankly, when the debate over this issue began our industry did not see a need to change the law. We believed that the Supreme Court's 1985 decision in Harper & Row v. The Nation, 471 U.S. 539 (1985), dealt fairly and adequately with the question of the fair use of unpublished copyrighted material. We were concerned that any legislation might open up the fair use doctrine to permit copying of confidential business materials, some of which are of great importance to our industry, by legitimizing a process called "decompilation" which I will explain in more detail later in my testimony. We were similarly concerned about unauthorized use of unpublished specifications for software under development, and other confidential business plans and materials.

However, the authors, the book and magazine publishing industries maintained that the Second Circuit Court's interpretation of the fair use doctrine in New Era Publications v. Henry Holt & Co., 873 F.2d 576 (2d Cir.), reh'g denied 884 F. 2nd 659 (2d Cir. 1989), cert. denied, 110 S. Ct. 1168 (1990) and Salinger v. Random House, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987), departed from the standard of Harper & Row. Our industry was satisfied with those decisions, but we were not opposed to finding ways to resolve the problems they raised for the authors, and the book and magazine publishers and to bring the Second Circuit Court decisions more closely into line with Harper & Row, as long as the remedy did not diminish our right to protect confidential material.

We could not, however, support the legislation proposed last year. To explain our objections to those bills, and the general concerns we had about amending copyright law, I will need to give a brief explanation of the state of our industry and why protecting our unpublished material is so important to us.

The American computer hardware and software industries are highly successful. The Council on Competitiveness found in a survey of twenty-three critical technologies released this March that software was one of the seven such technologies in which the United States holds a competitive lead.

The world market for software now stands at $70 billion a year, and some experts project it to reach $1 trillion by the year 2000. As successful exporters, the industries contribute to America's economic growth and balance of trade. With American companies now receiving 70% of the revenue from that market, and with our products the most sophisticated in the world, the software and hardware industries are in position to compete successfully for the foreseeable future as well.

Piracy -- the illegitimate duplication and sale of computer programs -- is the most serious threat to that position. Our market is growing, and many companies will try to enter it. We expect this and welcome it. Competition generally promotes innovation and is good for consumers. But in order to do so, competition must come from companies which produce innovative technology and high-quality goods -- not individuals who sell knock-offs of the programs written by others. That kind of business is piracy, and is forbidden under American law.

Simple piracy -- copying somebody else's program and selling it -- is a relatively straightforward legal problem. Nobody in the United States argues that it should be legal. We do face major problems with such piracy in some foreign countries that have inadequate intellectual property protection or enforcement. In Thailand and China, for example, piracy is common, and the USTR rightly decided to cite them under the Special 301 section of the 1988 Trade Act this April. For another example, computer programs receive no legal protection in Mexico. As Karen Casser of the Software Publishers Association recently testified, our industry will probably lose $100 million in sales this year in Mexico. The Mexican legislature is working on a bill which would protect software, and we are watching its progress very closely.

Problems like those we face in China, Thailand and Mexico are serious, and cost our industry a great deal every year. But we face a more serious legal challenge from a second type of piracy. That is when a competing company creates an imitation of an existing program through a process called decompilation, in which the pirate copies and translates the program from a machine-readable form to a human-readable form. Then, without the necessity for the significant R&D expenditures made by the innovator, the pirate goes on to alter the program to disguise the copying, and create a second, similar program which it markets as an allegedly different product for a much lower price.

The accepted application of American copyright law to computer software rightly forbids this practice. By doing so, it has made American software companies confident that they can market their products safely. It has fostered a prosperous, innovative and successful industry.

But in recent years, some companies which have not kept up in quality and technological innovation have been trying to catch up -- not by writing better programs, but by attempting to weaken the copyright law to permit decompilation so that they can imitate the programs of more successful companies. For example, as the European Community drafted its directive in preparation for the single market in 1992, there were attempts to amend the Software Directive in order to allow greater scope for decompilation. And in the current GATT negotiations, the Japanese government is trying to secure exemptions from copyright for these procedures against the opposition of the U.S. Trade Representative and the American software industry.

Up to now, however, these attempts have failed. In domestic law, the "fair use" doctrine as laid out in Harper & Row v. Nation has ensured strong protection for our unpublished computer programs and other confidential business materials. As a consequence of this protection, the computer and software industries have prospered, grown, innovated and made new products and technology available to consumers. We would like to see that continue.

And in that context, the members of the Subcommittee will certainly understand the concerns that amending the fair use doctrine raised for our industry last year. Proposals to revise copyright law to allow greater scope for unconsented copying and use of unpublished works raised questions about whether the result would be that unpublished computer programs and other confidential materials would become available for competitors to copy and imitate. There was a great deal of alarm in our industry, and we wanted to make very sure that when Congress acted to resolve the concerns of the authors and the book and magazine publishers concerns, the changes did not inadvertently damage our companies and harm the competitiveness of our industry.

As I testified during joint House and Senate hearings last year, the language proposed in the bills introduced in the last Congress was so broad as to eliminate the distinction between published and unpublished works in determining the scope of fair use. The bills would have weakened protection not only for unpublished writings of interest to historians and biographers, but for unpublished materials of any kind, severely restricting the right of authors to determine whether or when confidential business and technical work would be published or sold. Not only would unpublished computer programs have been opened to unauthorized copying, but materials like marketing programs, advertising campaigns and blueprints and the technical descriptions of new hardware and software products would have been affected as well. This would have done serious damage to our companies, and to American competitiveness in the hardware and software markets. We could not support the legislation, and we informed the Subcommittee and other interested parties of our concern about it.

That concern has now been resolved. Since the joint hearing last July, our industry has worked closely with the authors and the book and magazine publishing industries to agree on narrowly crafted legislation that will meet the specific concerns raised for the publishers and scholars by the Salinger and New Era cases, while ensuring that our confidential materials continue to receive strong protection under copyright law.

The language contained in H.R. 2372 meets the concerns we raised in the last Congress. The legislation is fundamentally a reiteration of long-standing fair use doctrine as enunciated by the Supreme Court in Harper & Row v. The Nation.

In reaching that conclusion, we focus on three essential components of the Supreme Court's discussion in that case.

First, the Supreme Court emphasized that the unpublished nature of a work is an important factor in determining whether its use is fair. The Court flatly rejected the contention that Congress intended fair use to apply equally to published and unpublished works.

Second, the Court made clear that this important factor weighs against a fair use finding. The Court concluded that the application of fair use to unpublished works is narrowly limited, since "[p]ublication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public, a factor not present in fair use of published works." 471 U.S. at 551.

Third, the Court stated that the unpublished nature of a work is not necessarily determinative in fair use analysis. As the Court's opinion illustrates, all of the fair use factors must be considered.

We believe the proposed legislation reflects and preserves these three important principles from Harper & Row. The language makes clear that the unpublished nature of a work is an important element in the overall fair use analysis. It states appropriately that the fact that a work is unpublished tends to weigh against a finding of fair use. And finally, it makes clear, consistent with Harper & Row, that the fact that a work is unpublished does not create a per se rule against finding fair use. The fact that a work is unpublished does not bar a finding of fair use, if such finding is warranted after a full analysis of all statutory factors.

The bill is a carefully drawn compromise. It is acceptable to our industry, and we are informed that it meets the needs of the authors, the book publishers and the magazine publishers as well. We are pleased to support it, and we thank you again for the invitation to testify this morning.

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Mr. Neukom, welcome.

STATEMENT OF WILLIAM NEUKOM, ESQ., VICE PRESIDENT AND GENERAL COUNSEL, MICROSOFT CORP., REDMOND, WA, TESTIFYING ON BEHALF OF SOFTWARE PUBLISHERS ASSOCIATION

Mr. NEUKOM. Thank you. I appreciate the opportunity to testify this morning before the subcommittee on behalf of the Software Publishers Association. That association is by any measurement the leading trade association of personal computer software companies. Its membership includes approximately 800 companies publishing business, education, and entertainment software. Those companies range in size from a few employees to, in some instances, thousands of employees.

As an industry, software publishers are dependent upon intellectual property rights to protect the value of our business assets. We appreciate, particularly because of that interest, this opportunity to testify this morning.

As to the proposed legislation, H.R. 2372, we recognize it as an amendment to section 107 of the Copyright Act, which embodies the traditionally created fair use doctrine, the fair use doctrine being a body of case law unique to the United State judicial system which permits unauthorized copying under certain very limited circumstances, as currently drafted and interpreted and applied by the courts of this country.

In the United States and other countries, our member companies', software publishers' products are protected as literary works under the copyright law. Maintaining the integrity of those copyrights in these literary works is essential to our ability to continue to grow and prosper not only in the U.S. domestic market, but at least as importantly, to compete effectively in international trade.

Because U.S. companies command a 70-percent share of the software market worldwide, there is a temptation and, I would submit, even an incentive for persons so inclined in other countries to try to erode the market share by undertaking shortcut methods of developing and marketing productivity software and other forms of computer software. The way they tend to do that is by simply copying legitimate copies, rather than going to the expense and enormous intellectual challenge of creating original solutions to problems in the form of computer software.

We are not only concerned that any changes in domestic law not permit any wider copying of our works here in America, but we also obviously wish to discourage the rampant piracy which we find worldwide.

The form of literary work represented by computer programs can be embodied in a number of ways. For example, computer programs are usually first written as source code. Source code is a kind of literary work very close to the sort of writing product by our print publishing colleagues. It consists of human-readable words, usually expressed in a special computer language which can be written down on paper, easily read by the human eye, and understood by knowledgeable computer programmers.

However, the form of a computer program which is electronically imprinted or encoded on a floppy or hard disk and produced in thousands and, in some instances, I will say, even millions of copies and distributed to the public is not source code. The form of that computer intelligence is object code.

Object code can be read and understood by the computer, by the chips, but very rarely by a human being. When printed out, object code would appear to you and me to be simply a series or a list of zeroes and pluses or zeroes and ones, which translate a human-readable source code to electronic impulses the computer can understand and work with.

If one were skilled in computer technology and possessed the proper equipment, one could retrieve the object code off a disk to read and study; however, it is extremely difficult, if not as a practical matter impossible, to understand the source code by reading the object code. In effect, the object code is an encrypted version of the human-readable source code.

What is actually published by software companies, that which is fixed in a tangible medium of expression, is the object code only. If competitors can have ready access to our source code, the human-readable version of our intellectual property, they can often make slight modifications and publish it in the form of a different object code, which would effectively approximate the original publisher's computer program.

The result of that, as you can appreciate, is that software publishers can retain software code as a trade secret. For that reason, the fair use treatment of published and unpublished works is of special interest to us.

We are alarmed by any legislation which would undermine the historic differences. The bills introduced last year to resolve the *New Era* problem virtually would have abolished that distinction—we think, dangerously so. In the software publishing industry, we believe H.R. 2372 is in the public interest, that to the extent that it has been carefully drafted and tailored to deal with the specific problems of print publishers and the kinds of authors—primarily historians and critical biographers—who originally requested the legislation in the last Congress, we are prepared to accept the contention of those print publishers and those particular kinds of authors that recent second circuit decisions have had a chilling effect on the New York-based publishing community, which is limiting the publication of works of value to the reading public.

However, we also believe very strongly that the traditional distinction of the fair use analysis of published and unpublished works, which the Supreme Court recognized in the *Harper & Row* case must remain undisturbed. We believe H.R. 2372 serves this purpose by embodying the Supreme Court's teaching in that case.

So long as it is restricted to resolving the very precise problems raised by print publishers and those particular kinds of authors, we believe the rights of software copyright authors would not be eroded. The institutional incentive which gave rise to our successful industry would remain intact.

Therefore, we strongly urge enactment of H.R. 2372 without amendment.

Mr. HUGHES. Thank you, Mr. Neukom.

[The prepared statement of Mr. Neukom follows:]

TESTIMONY OF WILLIAM NEUKOM VICE PRESIDENT, LAW AND CORPORATE AFFAIRS OF THE MICROSOFT CORPORATION ON BEHALF OF THE SOFTWARE PUBLISHERS ASSOCIATION

May 30, 1991

Mr. Chairman, I am William Neukom, Vice President, Law and Corporate Affairs and Secretary of Microsoft Corporation, the largest publisher of software for personal computers in the world today. I am testifying on behalf of the Software Publishers Association (SPA). The SPA is the leading trade association of the personal computer software industry. Its membership includes nearly 800 business, education, and entertainment software publishing companies ranging in size from one or two employees to many thousands. As an industry we are extremely dependent on intellectual property protection, and we appreciate the opportunity to testify this moring in support of H.R. 2372 as presently drafted.

H.R. 2372 amends Section 107 of the Copyright Act which embodies the judicially created fair use doctrine. As in the United States, our companies' products are protected as literary works under the copyright laws of other nations. Maintaining the integrity of our copyrights in these literary works is central to our ability to continue to grow and prosper both in the U.S. domestic market and to compete effectively in international trade. Fair use is a body of case law, unique to the U.S. system, which permits unauthorized copying under very limited circumstances. We are very concerned that any changes in that body of domestic law not be seen as a pretext to permit wider copying of our works -- at home or abroad. As long as H.R. 2372 is restricted to the very limited problems raised by print publishers, we believe that the rights of software copyright holders will not be eroded, and that the constitutional incentives which gave rise to our successful industry will remain intact.

Mr. Chairman, when you met recently with proponents of H.R. 2372, you stated that you believe that the ultimate question which must be asked by the Congress in assessing intellectual property legislation is: is it in the public interest?

This question assumes a burden on the part of proponents of a particular measure to persuade this subcommittee that the best interests of our nation's citizens would be served by it. As an industry which is very dependent on intellectual property and from time to time seeks legislative changes, we have always been prepared to meet this burden. And, we would expect that others would be expected to do so as well, particularly when there may be some dislocation or disruption to the sector of the economy we represent.

To use the idea/expression dichotomy of the copyright law, there is often a big difference between a legislative idea and how it is actually expressed in a bill. We in the software industry support the idea which our colleagues in the print publishing industry have been seeking to embody in legislation since last year. Unfortunately, until recently, we have not been able to concur on specific language expressing this idea. In my testimony this morning I will try to explain what we perceive to be the circumstances which gave rise to print publishers' desires to amend section 107 of the Act and to explain why we feel that legislation responding to their legitimate needs must be very carefully drawn.

Mr. Chairman, the language of H.R. 2372 has been very carefully drafted to embody a legislative "idea" or objective. It is a direct successor to H.R. 4263 and its Senate counterpart, S. 2370, which were introduced by Congressman Kastenmeier and Senator Simon in the 101st Congress. The purpose of H.R. 2372 and predecessor bills is to deal with the chilling effect on the use of quotations from unpublished works by biographers and historians arising out of the Second Circuit Court of Appeals decisions in *New Era Publications, International v. Henry Holt & Co.* 873 F. 2d 576 (1989), *cert. denied*, 110 S. Ct. 1168, 107 L. Ed. 2d 1071 and *Salinger v. Random House*, 811 F. 2d 90 (1986), *cert. denied*. 484 U.S. 890 (1987).

The 377 page hearing record, compiled in the last Congress, details with explicit clarity the unusual facts which led the nation's print publishers to seek legislative relief from the *New Era* and *Salinger* cases.

As you know Mr. Chairman, it is rare for Congress to respond legislatively to a single lower or intermediate court decision. In most instances, the case law is not considered to be sufficiently developed to require legislative clarification until either a trend among the circuits emerged or the Supreme Court has spoken. Neither of these two circumstances has occurred here. What makes the *New Era* case unusual is that it affects an industry -- print publishing -- which is geographically concentrated in the Second circuit. Therefore, with respect to that industry, a Second Circuit decision can have virtually the same effect as a Supreme Court decision.

What is the chilling effect of the *New Era* case? Floyd Abrams stated clearly in his July 1990 testimony:

> history cannot now be written, biographies prepared, non fiction works of almost any kind without the gravest concern that even highly limited quotations from letters, diaries or the like will lead to a finding of copyright liability and its consequent issuance of an injunction against publication.

It is important to note the nature of the organizations on whose behalf Mr. Abrams was testifying last year: the American Historical Association, the Organization of American Historians, the National Writers Union, the Author's Guild, PEN American Center, and the Association of American Publishers. For the most part these are organizations concerned with the print media and with the publication of biographical, historical and scholarly works. The particular focus on legislative relief for historians and biographers was further emphasized by the background of the two other witnesses appearing in support of the legislation: Taylor Branch, the biographer of Dr. Martin Luther King, and historian J. Anthony Lukas, author of Common Ground, a book about the history of school desegregation.

In response to Congressman Kastenmeier's question, "historically what has happened to cause this problem today?", Mr. Abrams replied:

> [T]here is an enormous clarity in almost a wooden fashion of the law today. One can say with some confidence, now -- one would not have, I think, some years ago -- that almost any type of unpublished work will be deemed a violation of the copyright law because it will not be deemed fair use. (emphasis supplied).

The essence of the testimony of Mr. Abrams and his colleagues was that the New York publishing community interprets current Second Circuit law as so narrowing the scope of fair use in unpublished works as to make any use of direct quotation in a history or biography a potential bar to publication of a book. William Patry, testifying for the Copyright Office confirmed this view in observing that "[t]he bills were introduced out of a concern that recent decisions by the United States Court of Appeals for the Second Circuit involving unpublished works may have created a virtual per se rule prohibiting biographers' and historians' use of such works."

However, not all the witnesses at the 1990 hearing agreed with the print publishers' interpretation of Second Circuit law. Mr. Patry expressed his own view that

> nothing in the current statute prohibits the application of fair use to unpublished works. Nor do any of the court decisions prohibit any use of unpublished works.

Indeed, the facts of the New Era case support Mr. Patry's view. In that case there were 132 alleged instances of unauthorized quotations from the unpublished letters and diaries of L. Ron Hubbard. The district court judge found that the great majority were fair use, but that 41 were not fair use. The Second Circuit did not dispute this finding.

Former Register of Copyrights, Barbara Ringer, told the subcommittees:

> I have read and reread the decisions and articles that have produced this heated controversy, and it does seem to me that the alleged crisis in scholarly writing and publication has been blown up out of proportion, and that there now seems to be considerable agreement among the majority and

> minority judges on at least two points: that the fair use doctrine can apply to copying of unpublished works (i.e., there is no *per se* rule), and that there is nothing in the statute to require a court to issue an injunction in these or any other cases.

My point, Mr. Chairman, in reviewing last year's testimony is to focus on the very narrow scope of the issue addressed by H.R. 2372. The fact is that the urgent appeal for legislative relief is predicated largely on the chilling interpretation given to Second Circuit holdings by the New York publishing community itself.

However, it is not my intention to dispute this interpretation. Rather, I wish to place it in its proper perspective. There is not a universal outcry from those with an interest in *all* aspects of the fair use doctrine for legislative modification of Section 107. Nevertheless, we in the software publishing industry are prepared to accept the premise that the *New Era* and *Salinger* decisions have created an intolerable problem for print publishers, historians and biographers which needs to be addressed. It is enough for us that the common view within that industry is that a problem exists which justifies a legislative response. And, we have pledged to be cooperative in developing this response.

However, Mr. Chairman, as we have made clear from the outset of the debate, software publishers believe that it is imperative that remedial legislation be carefully and narrowly drafted to respond only to the limited problem as articulated by print publishers and the authors of historical and biographical works.

We believe that the language of H.R. 4263 and S. 2370, in the 101st Congress was not sufficiently narrow, but that H.R. 2372 does accomplish its intended, limited purpose. H.R. 4263 and S. 2370 would have abolished the distinction between all unpublished and published works for purposes of fair use analysis. As such they clearly would have reversed not only the *New Era* case, but also would have overturned the Supreme Court's decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). That case involved a 2250 word article in *The Nation* which contained 300 to 400 words consisting of verbatim quotes from a manuscript about to be published by *Time* magazine. The Supreme Court in *Harper & Row* declared that, "[It] has never been seriously disputed that 'the fact that the plaintiff's work is unpublished ... is a factor tending to negate the defense of fair use.'" *Id*. at 551.

You may ask, Mr. Chairman, why we are so insistent that remedial legislation be so carefully and narrowly written?

The answer is that the historic differentiation in treatment of unpublished versus published works is of critical importance to the nation's software industry. As seen in the above reference to the *Harper & Row* case, the distinction between the application of the fair use doctrine to published and unpublished works has long been recognized in the law, and the software industry has structured its business practices in reliance on that distinction.

The Fair Use Doctrine is a creature of federal statutory and case law. And, prior to enactment of the 1976 Copyright Act only published works were subject to the Fair Use Doctrine. Unpublished works were governed by common law, which placed a high value on the right of first publication.[1] The Congress recognized this historic distinction when it federalized copyright law in 1976. As the Senate Committee Report accompanying the 1976 Act states:

> [T]he applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. S. Rep. No 94-473, 94th Cong., 1st Sess. 62 (1975).

In recognizing the historic difference in treatment of published and unpublished works, the legislative history of the Copyright Act is merely taking note of an obvious factual difference in the nature of published and unpublished material. The primary historic purpose of fair use has been to permit comment, criticism and further scholarly research based on previously published works. In publishing a work an author is presumed to invite public dialogue in the form of published criticism and comment as well as further scholarship based on his or her work. Authors reluctant to subject their writings to public dialogue and the necessarily inherent fair use of their works, have always been able to make the decision to keep their words to themselves through refusal to publish.

This "right of first publication" -- and the concomitantly narrower scope of fair use in unpublished works -- was recognized by the Supreme Court in Harper & Row when it referred to the Senate Report stating:

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[1] In his 1990 testimony William Patry, the Copyright Office expert on fair use, noted that "until the 1970 Act, publication constituted the general dividing line between federal and state copyright protection, with the latter form of protection generally reserved for unpublished works." Former Register of Copyrights, Barbara Ringer, testified that "United States copyright statutes up to 1978 [the effective date of the 1976 Act] expressly recognized authors' common law rights in unpublished works, and the case law was fairly consistent in holding that, under common law, fair use had very limited application to unpublished works."

> [t]he unpublished nature of a work is '[a] key, though not necessarily determinative, factor' tending to negate a defense of fair use. 471 U.S. at 554.

It is important to note, Mr. Chairman, that no witness this morning is disputing the Supreme Court's articulation of the fair use doctrine as set forth in the Harper & Row case. It is this common agreement on the validity of the Harper & Row decision which makes it possible for all parties to this debate to agree to the language carefully articulated in H.R. 2372. All of us involved in negotiating the language contained in H.R. 2372 believe that it constitutes a statutorization of the Harper & Row decision.

In recognizing the historic difference in fair use analysis of published versus unpublished works, the Supreme Court has acknowledged the legitimate privacy interests of a creator who chooses to forego publication. In the commercial context this privacy interest permits a creator to retain an unpublished writing as a trade secret.

When it specifically brought computer software under the protection of the Copyright Act as literary work in 1980, Congress and this Committee recognized that the enjoyment of federal copyright protection in unpublished writings did not in any way restrict an author's right to protect his or her work as a trade secret. In fact, the two forms of protection are complimentary. The House Committee Report accompanying the Computer Software Amendments of 1980 states:

> The Committee consulted the Copyright Office for its opinion as to whether section 301 of the 1976 Copyright Act in any way preempted these [trade secrecy] and other forms of state law protection for computer software. On the basis of this advice and the advice of our own counsel the Committee concluded that state remedies for protection of software are not limited by this bill. H.R. Rep. No 1307, Part I, 96th Cong., 2d Sess. at 23-24 (1980).

By these words this Committee in 1980 acknowledged the strong interest of the software industry in trade secrecy protection and the important relationship between it and copyright law.

Like the works of our colleagues in print publishing, the computer programs published by our industry are treated as literary works under the Copyright Act and its 1980 amendment. The form of literary work represented by a computer program can be embodied in a number of different ways. For example, computer programs are first written as source code. Source code is a kind of literary work very close to the sort of writing produced by our print publishing colleagues. It consists of human readable words -- usually in a special computer language -- which can be written down on paper, easily read by the human eye and understood by any knowledgeable computer programmer.

However, the form of the computer program which is electronically imprinted on floppy or hard disks, produced in thousands of copies and distributed to the public is not source code, but something called object code. Object code can be read and understood by the computer, but very rarely by a human being. When printed out, object code appears as a series of numbers -- zeros and ones -- which translate the human readable source code into electronic impulses that the computer can understand. If you are skilled in computer technology and possess the proper equipment, you can buy a typical computer program on disk and retrieve this object code so that you can read and study it. However, it is extremely difficult -- if not impossible -- to understand the source code by reading the object code. In effect, the object code is an encrypted version of the source code.

Therefore, what is actually published by software companies -- fixed in a tangible medium of expression and distributed in copies to the public -- is the object code only. The source code, which often contains the trade secrets of the software creator, remains unpublished. Many software companies go to great lengths to keep their proprietary source codes confidential. Source code is, in effect, the crown jewels for most companies. If competitors can have ready access to source code, they often could make slight modifications in it and publish a different object code which would expropriate the originator's computer program. It is for this reason that source code is often retained as a trade secret and never published.

The right to decide not to publish in any form source code goes to the heart of most software complies' strategies for retaining the confidentiality of their most valuable and carefully guarded trade secrets. It is for this reason that the historic differentiation in fair use treatment of published versus unpublished works is of particular importance to software publishers. Software publishers are understandably concerned with any legislation which would undermine this historic distinction. And, as we have seen, the bills introduced last year to resolve the New Era problem would have virtually abolished this distinction.

This brings me back, Mr. Chairman, to the question which I suspect is uppermost in your mind, and to which I referred earlier in my statement. Is H.R. 2372 in the public interest?

The Software Publishers' Association believes that the answer to this question is, yes -- but only so long as it is very carefully crafted to address the narrow concerns which were articulated by our colleagues in the print publishing industry. That is, to permit more expansive publication in the Second Circuit of quotations from unpublished writings in historical, biographical, and similar works of scholarship.

Neither the Salinger nor New Era cases addressed the fair use issues unique to the software industry which I have just described. Therefore, any corrective legislation should be carefully crafted to deal only with the limited issues raised by the print publishers and to leave intact the delicate relationship between published and unpublished computer code which is so vital to a healthy software industry.

As I indicated earlier, the burden of demonstrating a "public interest" in any proposed legislative change is one to be borne by the proponents of change -- in this case print publishers and authors of historical and biographical works. We believe that this burden has been met in H.R. 2372, but only for the very limited circumstances unique to that industry. No one is seeking a change in the traditional application of the fair use doctrine to published and unpublished computer programs. Consequently, we do not believe that we should be required to justify the retention of existing law. However, were we required to do so, we believe that we would demonstrate that the existing fair use differentiation between published and unpublished computer programs is overwhelmingly in the public interest.

The computer software industry is perhaps the fastest growing, most dynamic, creative and competitive industry today in America. It is one of the most successful of the nations' export industries -- today supplying 70% of the world-wide market. You can imagine that many of this nation's trade competitors find our success unsettling. It is only natural that they should be susceptible to the temptation to try to erode U.S. market share by shortcut methods: by copying our successful product rather than creating their own.

All we make, Mr. Chairman, is computer code. The plastic disks on which that code is electronically imprinted have less proportional value to the real product, the code, than a sheet of vinyl to a sound recording or sheaves of paper to the book which is printed upon them. And, computer code, by the very nature of the technology in which it is used, is the most easily and efficiently copied of all ephemeral copyrighted works. Any erosion of the carefully constructed copyright controls on which the industry relies could be catastrophic. Anything which erodes the Article I, Section 8, constitutional incentives upon which this industry was built could cripple it. Therefore, Mr. Chairman, we urge you to resolve the problem which print publishers have presented to you by approving without change the carefully crafted bill before you.

Mr. **Hughes**. From the testimony of both you, Mr. Neukom, and Mr. Burger, and from your written statements, it appears that your interests in the protection of unpublished work derive primarily from the effort to protect trade secrets. Is that an accurate summation?

Mr. **Burger**. Those documents are considered trade secrets; that is correct.

Mr. **Hughes**. What is the relationship between protection of trade secrets and the protection of copyright? You state that the two forms of protection are complementary. They may be complementary, but are they totally coextensive?

Mr. **Neukom**. Whether they are coextensive would depend on the facts of the case. As a practical matter, the remedies afforded to a software publisher seeking to enjoin the publication and the exploitation of its intellectual property in the form of a computer software product is much greater than the rights and remedies afforded under the trade secret law.

Trade secret laws are invariably products of State law. The substance and the remedies of relief made available vary from State to State, and as a practical matter, for a lawyer whose job is to manage a department whose first priority is to protect intellectual property rights, as we try to go around this country and protect those rights, it is terribly important for us to have access to the Federal courts in order to use the presumption of validity of our copyrights to move for temporary restraining orders and preliminary injunctions which are readily enforceable in our Federal district courts around the country. It is simply a more efficient, effective remedy for us to proceed under copyright.

That is not to say we would not also allege in our complaint a misappropriation of trade secrets if it were appropriate to that case.

Mr. **Hughes**. It seems to me that that question is central to determining the degree to which the issues raised in the *Salinger* and *New Era* cases, in fact, implicate computer interests. In your statement, Mr. Neukom, you assert that the decision to publish in any form the source code goes to the heart of the software companies' strategies for retaining the confidentiality of trade secrets.

Similarly, Mr. Burger, your statement discusses the bills introduced in the previous Congress to address these problems; you bring in marketing programs, advertising campaigns, and blueprints and technical descriptions of new hardware and software, and the impact on them.

Trade secret laws protect matters such as strategies for retaining confidentiality of trade secrets and marketing programs, but are these really functions of copyright law, that is, protecting an advertising campaign, to use the words in the Constitution, to promote the progress of science and useful arts.

Mr. **Burger**. Let me answer that in a couple of ways.

I want to go back to your first question, which is that trade secret law is a very ineffectual protection against piracy of software, because that only protects the first person who has breached that trade secret right. For example, somebody takes or gets a hold of your source code published on network, uses it knowing that it is copyrighted. The trade secret law has no effect against that third person.

The second important point of why copyright is so important is that trade secrets are not recognized around the world. I think there is very little trade secret law in civil law countries.

I think both the two companies seated here before you started very, very small. We started in the proverbial, literal garage. It was the copyright laws not only in this country, but around the world that enable us to succeed in the marketplace, that protected that individual, intellectual effort. Relying on trade secrets to protect those kinds of items, the computer code, would not be very efficacious. Federal copyright law has been very, very effective in doing that.

With respect to marketing plans and things like that, we are concerned with that, but it doesn't rise to the same level in our corporate concerns as our unpublished computer code.

Mr. HUGHES. You would concede that marketing plans do not seem to be promoting science and useful arts?

Mr. BURGER. In some respects, it would. Again, obviously, as the authors and publishers have stated, it is a very fact-intensive question. It is hard to answer that in a broad way.

If what you understood there was detailed descriptions and the ability to take that and build the computer code—for example, our descriptions of our products, to use that in building a code—that would be something we would be concerned about, protecting our literal expression. As has been stated a number of times, it obviously only does protected expression; it doesn't protect the ideas.

Mr. NEUKOM. If I could briefly add to what Mr. Burger has said, we certainly start from an appreciation of the fact that copyright law only protects matters which are copyrightable. And the test is that a particular element in the product be original and that it somehow create an expression. We are well aware of the idea, whether certain business information, separate from science, of what is in the program, is copyrightable is a very nice question; and typically that is an area of value to a company which is more likely to seek trade secret protection, simply because it wouldn't meet that test.

On the other hand, it is the crown jewels of these publishers, the intellectual property that goes into those programs which make up the products there. The test is the same. The test is generally met in many instances, where a particular expression becomes copyrightable.

Mr. HUGHES. Do you feel that title I of the bill changes current law regarding decompilation, which is at the heart of your concern; or do you believe that asking for a modification in object and source code in the same work is the route that you need to take?

Mr. BURGER. We feel confident that continuing the Supreme Court's decision protects us against decompilation. We take the position that source code isn't published by publication of the object code. We believe there is legal support for that position. So far as we know, there is no court that has held otherwise, so we feel comfortable with the legislation.

Mr. HUGHES. Mr. Neukom, are Disk Operating System programs, like the ones sold by your company, that are sold over the counter in computer stores nationwide, unpublished or published in your opinion?

Mr. NEUKOM. The object code of the computer software products that we distribute is published. Object code, not the source code that underlies that. And it is protected both by copyright and by the license agreement which accompanies the product.

Mr. HUGHES. Mr. Neukom, in your statement on page 7 you appear to argue that all source code remains unpublished. Does the distribution of a work in object code constitute publication of the same authorship as the source code?

Mr. NEUKOM. We believe emphatically it does not. Again, the source code is the medium in which the computer software engineers develop the programs that make up the product; and then there is this translating, interpreting process where that human-understandable information is converted into a form which the machine can understand and human beings cannot. That is what makes it effective.

And to go back from the object code, the machine-readable version, to the source code, the human-readable version, is an enormously important step. That is exactly what is at the heart of the decompilation concern we have, and I would just echo that we would emphatically believe and insist that nothing in this new language of legislation would change the current rights that software publishers need to protect against decompilation.

Once you go back to the human-readable version, then the barn door is wide open for people who have the wrong interest, to work from the human-readable, -understandable version to a machine version which is simply different from the authorized product. It is very difficult then for a legitimate publisher to enforce its rights. We find ourselves competing against illegal and unauthorized copies, competing against ourselves. It is not absolutely unfair.

Mr. HUGHES. What would you say to the following argument that we have heard? Since the object code is, in effect, a translation of a source code, it is a derivative work. Under copyright law, publication of a derivative work constitutes publications of the underlying work and, thus, the source code is published.

Mr. NEUKOM. I disagree with it wholeheartedly, and I am not aware that any court has even looked in that direction.

Mr. HUGHES. What would be your argument in response to that? I know you are opposed to that approach, but on what basis do you take issue with that problem?

Mr. NEUKOM. That they are utterly different works. The one work which is human-readable and -understandable is different from the work which is only machine-readable; and that the author ought to be able to preserve the rights to distribute and, therefore, publish one version rather than the other version, particularly if the publication of the object code carried with it willy-nilly the publication and exposure of what is otherwise a secret body of information which holds the ultimate value to the publisher.

Mr. HUGHES. Aside from the difference of being readable, what other differences are there?

Mr. NEUKOM. If the source code came to the attention of a knowledgeable computer software engineer and embodies not just expressions, but in some cases, ideas and solutions and shortcuts, ways of solving business or education or government decisionmaking problems, and the object code then is again a machine-readable version of that; if unauthorized personnel are able to go into the vault, if you will, of a publisher and trace the thinking of that publisher as expressed in the source code, then you are getting to a very different level of understanding of what is secret and valuable about the design and the approach that that publisher has taken to solving those problems.

Mr. BURGER. Mr. Chairman, can I respond?

Publication, in the legal sense, depends on the nature and circumstances under which the work is communicated. And there is no rule in copyright that says one form of dissemination is the publication of another form. For example, you could have a public performance of a work which, in effect, widely distributed the work; but that's not considered publication, necessarily.

As Mr. Neukom said, and I said earlier, there aren't any cases that hold to the contrary. So we feel very confident that the source code is not published. We don't disseminate the source code; it's our crown jewels. It's kept under lock and key.

Mr. NEUKOM. If I may suggest an example that may bring home the practical sorts of challenges our companies face on a daily basis, a few years ago, as the Chair may recall, there was a problem in Brazil; and Microsoft found itself in this situation as to the Brazilian market.

We were there, we wanted to distribute our MS-DOS operating system software, and we were confronted with two problems. The first problem was that some local software developers in Brazil had made what we believed was a pirated version of our product. This is a product which today is probably running on anywhere from 50 to 70 million desktop computers around the world. It is a very common product and is the foundation of an enormous share of the desktop computing done in this world.

We found there was an unauthorized copy in Brazil. That was the first whammy. The double whammy was, we were told by the Brazilian Government that we could not bring our product into the market even to compete with a pirated version of MS-DOS.

The U.S. Trade Representative's Office was very helpful in remedying that problem. In the last several months it has become known to us that in the Korean market right now that same product, MS–DOS, in a more recent version, is competing against a product called K–DOS, "K" as in "Korean," DOS. It is in some way sponsored by the Korean Government.

When we asked them how they developed it, the answer was, "Someone in Brazil wrote this for us." Now, I ask you, how is it that a company like ours can maintain our competitive edge when we have gone to the expense and difficulty of developing this product, and we confront those kinds of challenges in governments and misguided entrepreneurs and scientists who are essentially taking our technology and using it to require us to compete against ourselves?

Mr. HUGHES. I am not suggesting in my questions that you shouldn't have a right to protect your creation, because I believe that. The problem is that these technologies were not envisioned when the patent, trademark, and copyright laws were written many years ago.

The question is whether or not this is an appropriate mechanism to provide that kind of protection. There is no quarrel with the question of protecting what, in essence, are trade secrets and, as you contend, copyrightable material.

Mr. BURGER. I really would like to address that. That is a very fundamental question.

I agree that is something you should be considering very seriously. When we look back on the history of this constitutional provision, the original works, actually, that were protected under copyright were utilitarian works, maps and charts. The Copyright Act has been amazingly flexible and amazingly protective of all sorts of works like records, movies and photographs, things that were not even conceived of when the Constitution was written. Maybe Benjamin Franklin did, but it wasn't conceived of by many people.

It is interesting that we are here today because the literary community has a legitimate problem with the way the literary portion of the act has been interpreted with respect to their works. And our position is, we are relatively happy; but we are very sympathetic with their problem, and we have no quarrel with returning it to *Harper & Row*. It has worked exceedingly well.

We, the U.S. industry, have 70 percent of the world market in software, and our fundamental belief is, that is because the Copyright Act has served its purpose and has promoted the useful arts and sciences, has enabled Bill Gates—I don't remember how old he was, but he took his company and turned it into a world power. This has really been extremely helpful to U.S. creativity.

The literary portion has worked very well for us and has enabled us to go to Brazil and say, look, this is the world-accepted version, and this is why what your companies are doing is illegal—make them stop it. We have been very successful in protecting American interests and keeping the balance of payments favorable to our industry and helping our industry continue to develop.

I think it has worked very, very well. The only people that I hear arguing against it are a few academics and some foreign companies who are behind and want to, quote, catch up.

Mr. HUGHES. I understand.

Well, you have been very helpful. I want to thank you and the industry for working with the publishers, the authors, the broadcasters, the entire coalition of business interests, in working out what appears to be a fairly good compromise.

Thank you very much. That concludes the hearing for today, and the subcommittee stands adjourned.

[Whereupon, at 12:55 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

COPYRIGHT AMENDMENTS ACT OF 1991
(Fair Use of Unpublished Works)

THURSDAY, JUNE 6, 1991

House of Representatives,
Subcommittee on Intellectual Property
and Judicial Administration,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:07 a.m., in room 2226, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Mike Synar, Barney Frank, George E. Sangmeister, Carlos J. Moorhead, Howard Coble, F. James Sensenbrenner, Jr., and Craig T. James.

Also present: Hayden W. Gregory, counsel; Michael J. Remington, assistant counsel; Veronica Eligan, staff assistant; and Joseph V. Wolfe, minority counsel.

Mr. Hughes. The Subcommittee on Intellectual Property and Judicial Administration will come to order.

The Chair has received a request to cover this hearing in whole or in part by television broadcast, radio broadcast, and still photography, or by any such methods of coverage. In accordance with committee rule 5(a), permission will be granted unless there is objection. Is there objection?

[No response.]

Mr. Hughes. Hearing none, permission is so granted.

Good morning. This morning the subcommittee is holding a second day of hearings on H.R. 2372, the Copyright Amendments Act of 1991. At the outset of the first day's hearing I made a lengthy opening statement. Today I will only add a few additional thoughts to that statement.

The generalists in the Congress are assigned the authority of making policy decisions in the intellectual property area. This is a new responsibility for me as chairman of the subcommittee. The legal landscape is somewhat blurred and at times difficult to comprehend.

As a useful starting point, copyright law should be considered as a statutory balance between the public interest and the proprietary rights of authors with the needs of distributors a part of the equation. Copyright law is an ecosystem of sorts with a delicate equilibrium of many competing demands. The U.S. Supreme Court has regularly underlined the requirement of balance in the exercise of Congress's constitutional authority to promote the progress of science and useful arts by securing for limited times to authors the exclusive right to their writings.

As the Court noted in *Sony Corp. of America* v. *Universal City Studios, Inc.*, and then again in *Harper & Row* v. *Nation Enterprises,* this limited grant is a means by which an important public purpose may be achieved. This principle applies equally to works of fiction and nonfiction, to copyright software as well as books, movies and records.

Last week, we received testimony from the parties in interest—authors, book and magazine publishers, copyright hardware and software companies—which agreed on the solution incorporated in title I of H.R. 2372. Today we will hear from several perspectives who were not participants in the negotiating process: A famous author, the Register of Copyrights, a computer industry association, a law professor, the educational community, and a video monitoring service association. We have asked these witnesses to give us their views about whether title I meets the public interest test required by the Constitution, the delegation of authority to the Congress and the political process.

The goal of this hearing, as was last week's, is to stimulate debate among the witnesses and to promote understanding by subcommittee members. Several witnesses will also testify about title II of H.R. 2372, relating to copyright renewal, a subject about which we will receive more testimony in 2 weeks. Next week, the subcommittee will hold a hearing on title III, which involves film preservation.

I now recognize the ranking minority member of the subcommittee, the distinguished gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. Well, thank you, Mr. Chairman.

Last week we heard from the various parties that negotiated the language embodied in title I of H.R. 2372. Today, the Register of Copyrights and other interested parties will provide their analyses of this language and the issue that gave rise to it.

It has been suggested that the second circuit in *Salinger* and the *New Era* has not enunciated a firm prohibition against the invocation of the fair use defense in the unpublished works context, but, in my opinion, this misses the point, which is whether or not the court's language has a chilling effect on the production and publication of the works of historians, biographers, and journalists.

At our hearing last week we heard evidence that reasonable attorneys, because of the specter of the recent second circuit decisions, are routinely advising publishers against relying on fair use defense when they are dealing with unpublished works. As a result, the public is being denied access to the raw materials that are the lifeblood of these authors.

Rather than wait for the court to possibly lumber toward its own restoration of the rule set down in *Harper & Row,* I believe it is appropriate for Congress to intervene in this instance in an effort to restore the appropriate balance between the affected parties.

Finally, I note that next week we will turn our attention to the reauthorization of the National Film Board. On this issue I would just like to note my continued uncomfortableness with the Congress requiring the labeling of expressive works, and I look forward to fully exploring that issue next week.

Thank you, Mr. Chairman.

Mr. HUGHES. I thank the gentleman.

Our lead off witness this morning, Scott Turow, finds himself as number one on the Washington Post bestseller list for his book the "Burden of Proof." This literary success follows in the footsteps of his first novel, "Presumed Innocent," which also held a number one position for almost a year. I have read the one book and I am about halfway through the other, as I personally indicated to Scott Turow. I am enjoying it very much.

In addition to being a respected author, Mr. Turow, a partner in the law firm of Sonnenshein, Nath & Rosenthal in Chicago, IL, is a practicing lawyer. He is a former assistant U.S. attorney for the Northern District of Illinois. Mr. Turow is an expert in criminal justice administration.

Before he leaves the witness table, members may feel free to question Mr. Turow about issues within the subcommittee's jurisdiction such as the prosecutorial function, corrections, RICO reform, and all such matters.

[Laughter.]

Mr. HUGHES. Mr. Turow, we are very, very happy to have you with us this morning. We have your statement which, as I indicated to you this morning, we have read. We find it extremely well done. We hope you can summarize, but you may proceed as you see fit.

Without objection, your entire statement will be made a part of the record.

Welcome.

STATEMENT OF SCOTT TUROW, ESQ., SONNENSHEIN, NATH & ROSENTHAL, CHICAGO, IL

Mr. TUROW. Thank you very much, Mr. Chairman, and other members of the committee. I truly am grateful for the opportunity and deeply honored as both a lawyer and a writer to be here today.

As I think my statement makes clear, I do not object, as an imaginative writer speaking for a party of one, to title I of H.R. 2372. In my own view, I think it restates the existing law and it does something that I think the law ought to do, which is to continue what I would say is a restrictive or hesitant approach to the fair use of unpublished material. That is a subject of peculiar concern to me as an imaginative writer.

Inasmuch as my written statement is of record, with your permission I will depart from that a little bit with an anecdote. I suppose you would expect as much of a novelist.

When I went to college, I went to Amherst College in Massachusetts, and having no other real idea of how to become a writer I did what many writers before me have done and took English classes. There was a famous freshman English program at Amherst College led by the chairman of the department, a renowned professor named Theodore Baird. And Professor Baird would walk into his opening freshman class and he would pick up a pencil and he would walk up to the young man in the first row and he hit him in the face with it. And he would say, "What is that?" And of course, the young man would respond, "A pencil," and Professor Baird would then hit him again. And he would repeat this with each of the 15 or 20 young men in the room. Then he would come back to the front of the classroom and he would say, "It's a weapon." And he would then go to the window and he would say, "What is this?" And, of course, he got answers that began with "window" and went through architectural descriptions of windows. And he would say, "No, no. It's an exit." And he would then lift it, step through it and depart for the remainder of the class period.

From that and, obviously, many other parts of my education I took what I think is an indisputable principle. That is, that the genius of every writer is in the words that she or he chooses or does not choose. And when a writer, an imaginative writer particularly, but any writer has not decided to send his or her words out into the world at large it strikes me as being, or at least risking, an invasion of the very essence of authorship for someone else after the fact to make that decision for the author in using the author's original expression. It is those words that the author chooses to publish or not to publish by which the author and that fundamental act of authorship is known.

In considering the problem of fair use, as my statement notes, I do not believe in absolute rules of prohibition. I think it is possible for fair use restrictions to, in essence, inhibit the very rights of expression of secondary text authors as well. But I do think that it is rare that that will happen, and we must bear in mind that rarely does the secondary text author want to make fair use of the dull or routine expression. Indeed, that may not even be protected by copyright. It is often the liveliest expression, the expression that most captures the genius, as it were, of the individual author that is subject to fair use, but which contrarily is probably what ought to be most subject to protection.

As an imaginative writer, I take particular concern because I know how important it is to experiment in writing imaginative work—in writing plays, in writing novels, in writing poems—and those experiments can often amount to verbal formulations that, as I say in my statement, can be not only laughable or juvenile but even offensive, and one must know in writing freely that it will be the author's right to determine whether or not those experiments come to the light of day. And I am troubled by suggestions as were, for example, contained in the *New Era* opinion in the district court that it might be appropriate to make fair use of an unpublished manuscript that somehow came into a critic's hands in order to criticize the published novel.

The other problem, of course, that it is hard not to focus on for the author is the problem of multiple fair uses. That one fair use may beget yet another. If controversy begins, it means that someone must answer. Perhaps other aspects of a particular controversy may then come to light and the author may find him or herself in a position where an unpublished work has largely fallen or significantly fallen into the public domain, because of controversy that was created by fair use in the first place.

With no intention to deride the good and noble work that is done by scholars and commentators and researchers, I find myself unpersuaded that—notwithstanding the kinds of laments that the members of the subcommittee and you, Mr. Chairman, have been subjected to in recent sessions of Congress and recent sessions of this subcommittee—I find myself not persuaded that the freedom of expression of those secondary text authors has thus far been seriously impeded. Part of that rests on the distinction between copyrightable expression and unprotected facts and ideas that the copyright law, of course, recognizes, which guarantees that facts cannot be hidden or ideas censored.

I also must note something that I have not seen often said, which is that the common law made prohibitions on fair use of unpublished material almost absolute. Indeed, the protection of unpublished work was so great that even in a nation like England in the nineteenth century where you could be imprisoned for debt, creditors were still barred from seizing the unpublished manuscripts of authors, no matter how valuable. And notwithstanding that nearly absolute bar, scholarship did not cease over the centuries.

And so I do find myself less than completely persuaded, particularly, as I indicate in the statement, because I recognize, and I recognize it as being a good thing, that the scholar or the researcher or the critic is hoping to profit for his or her own sake in using the original expression of the original author, whether it is in the rare instance where there is some commercial advancement or more often the kind of career enhancement that someone is likely to enjoy when their work is perceived as being more vivid or more accurate because they have used original source material.

All of these concerns highlight what is for me another serious problem of allowing the broad fair use of unpublished material, which is that too great leniency on the fair use question will undoubtedly move authors of original materials to destroy those works. It will become de rigueur for authors to get rid of the drafts of their novels rather than take the risk that there will be unwanted publication of them, even if it is the brief form that fair use permits. And I can think of other examples where that kind of incentive would exist.

So, I favor, as I indicate in the statement, the continuation of the case-by-case approach that section 107 has put in place, and I urge the committee to maintain legitimate restrictions on fair use of unpublished material bearing in mind that an absolute bar would be, in my view, inappropriate.

Mr. HUGHES. Thank you very much, Mr. Turow.

[The prepared statement of Mr. Turow follows:]

STATEMENT OF SCOTT TUROW

BEFORE THE

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY
AND THE ADMINISTRATION OF JUSTICE

COMMITTEE OF THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

6 JUNE 1991

Mr. Chairman and Members of the Subcommittee:

My name is Scott Turow. I am a writer, probably best known for my novels, and also a practicing attorney. I am deeply grateful to the Chairman and the Members of the Subcommittee for the opportunity to appear before you today.

As a writer of imaginative works, I have been concerned about efforts made in prior sessions of Congress to eradicate the distinction between published and unpublished works for purposes of determining fair use under Section 107 of the Copyright Act. I believe that substantial interests of authors of original works in determining whether and how their expression should be published would be impaired if that distinction were erased.

On the other hand, I recognize that an absolute bar on any use of unpublished expression could occasionally so hamper authors of secondary texts as to restrict their rights of expression as well. I frankly think those instances are relatively rare and that ordinarily the unpublished expression of the original author should not be subject to fair use, a position supported by the current judicial interpretations of Section 107 rendered by the Supreme Court in the *Nation* case, and the Second Circuit in the *Salinger* and *New Era* decisions. I regard Title I of H.R. 2372 as a restatement of that existing law; for that reason, although the amendment is arguably unnecessary, it is certainly not objectionable from my point of view.

Although I am a lawyer, I should emphasize that I do not regard myself as an expert on intellectual property questions. I speak here principally as a writer, albeit one familiar with legal concepts and parlance, and simply for myself, though casual conversation has convinced me that many writers of original works share my opinions.

Indeed, the present controversy about fair use involves a bit of internecine strife in the literary community. Writer is pitted against writer. As members of the Subcommittee know, many authors of secondary texts -- critics, historians and other scholars -- lament the current fair use restrictions on unpublished work, especially as they have been interpreted by the Second Circuit. These authors contend that the result leaves them unable to quote or paraphrase unpublished work without fear of litigation, an apprehension that they say threatens to rob secondary works of vividness and the accuracy of direct quotation. Especially since many of the professional authors' organizations -- the Author's Guild, PEN and the Dramatists Guild to name those I am aware of -- have tended to support the authors of secondary texts, the position of the authors of original works may in some minds have been overlooked. Therefore, I am pleased to be here today to explain why I believe that the interests of original authors require that secondary use of unpublished material take place only on the most limited and judicious basis.

I see three principal arguments in behalf of maintaining a legislative policy against fair use of unpublished expression in the ordinary case. First, I view another's use of expression that an author has not chosen to publish as a significant interference in the essence of authorship. Second, protection against unwanted publication of copyrighted expression is consistent with the property law concepts that underpin our copyright laws. Finally, I think that broadly granted fair use of unpublished material will ultimately be counterproductive to the cause of scholarship and will encourage the destruction of much original material.

I start from the simple-minded premise that it is difficult to see why an author who has not made the decision to expose given words to the world at large should have that choice made for her or him by someone else. Indeed, when I consider this issue in terms of the writing I try to do every day, I reach some quick and intuitive conclusions. For all writers, but especially the imaginative writer -- dramatists, poets, writers of fiction -- the very process of creation involves a constant winnowing and choosing, rejecting one phrase in favor of another, deciding which words are the ones by which the author is to be known and through which -- solely --the characters, the ideas, the world the author is creating exist. To allow secondary-text authors -- no matter how well-intended -- to use the original author's own words, particularly the words that were rejected but even others that were simply not prepared for public scrutiny, amounts to overbearing the fundamental authorial decision.

Moreover, creative work often aspires to be innovative. In the effort to tread new ground there is always the risk that particular expressions might be not only infelicitous or inappropriate, but even juvenile, laughable, or offensive. No matter how intrigued critics, scholars or readers might be to learn of these verbal experiments, the right to keep them from publication must remain with the author, or else that kind of experimentation is imperiled. The district court decision in the New Era case suggests that a literary critic who somehow came into possession of an early unpublished draft of a novel could make fair use of it in criticizing the published book in order to show an editor's role.[1/] My regard for the brilliant district court judge who rendered the opinion -- an esteemed friend -- is enormous, but for the reasons indicated this particular suggestion chills me to the bone.

[1/] New Era Publications v. Henry Holt and Co., 695 F.Supp. 1493, 1502-03 (S.D.N.Y. 1988) (subsequent history omitted)

My position as an author tends to be fortified by what I know as a lawyer. Intellectual property, no less than other forms of property initially recognized at common law, would seem to carry with it the right, as the law professors put it, to "use or exclude" as the owner sees fit. If another individual presumed the right to help himself to a foot or two of my lawn, or a little knicknack on my mantle, no one would be surprised if I was aghast or called the police. It is not clear to me why in the ordinary case, the protections afforded unpublished expression -- property which the owner has not chosen to market or broadly share -- should be less.

This is especially so when one bears in mind the constitutional purposes of securing for copyright holders for a given period the exclusive profits deriving from their endeavors. As a former member of a university English Department, I must be permitted the practical observation that the scholar, the critic, the researcher no matter how sincerely aligned with the search for the truth, is also attempting to profit for her or his own sake in using the copyrighted expression of the original author. Occasionally, the borrowed material betters the commercial prospects of the secondary work; much more often, the perception of increased vividness and accuracy enhances the scholarly or critical value of the borrowing secondary work, a development sure to benefit the secondary author in his or her scholarly or critical career. Either way, the secondary author is placing her or his interests ahead of the creator of the expression. Moreover, because neither facts nor ideas, but only particular expression, is placed off-limits by the copyright laws, I am convinced that only in the rarest instances will truth-seeking actually be seriously impeded.

Finally, I remain convinced that relaxation of fair use standards as to unpublished expression is contrary to the best interests of scholarship and would encourage the destruction of much unpublished work. To put that observation, and some of my earlier remarks, in even more personal terms, let me quote from a letter I wrote earlier this year at the invitation of Senator Orrin Hatch of Utah to the staff of the Senate counterpart of this Subcommittee:

> At the moment, the basement of my home is overcrowded with drafts, letters, and other [items of] memorabilia related to my literary career. The materials housed include not only early drafts of my two novels, Presumed Innocent and The Burden of Proof, but also a number of unpublished manuscripts from my salad years and the full diary I kept during my first year of law school that provided the basis for my nonfiction book One L. . .
>
> . . . Much of what is in my basement is intimate material reflecting inmost thoughts, often expressed in a fashion that is not gilded for the observation of others. I would not want anyone to publish a word of my law school diary. Similarly, I regard my unpublished manuscripts as part of a long, difficult and painful formative period in my creative life which are not likely to provide any significant insight to the intentions of the writer of today. Simply because I have decided against publishing this work, I resent the notion of any person appropriating any part of the expressions contained there. . .

> . . . At the encouragement of my wife who is tired of stumbling over these items, I have begun to ponder the circumstances under which I might be willing to house these materials with one of the libraries that have from time to time asked for them. Amendment of section 107 [to erase the distinction between published and unpublished work] would make me [unlikely] to proceed, since a library [could] offer far less assurance concerning the circumstances under which anyone who reviews these materials might make fair use of them. In fact, if these amendments were adopted, burning might be the only way an author could be sure that her or his unpublished work remains unpublished in toto.

Obviously, all of my remarks are strongly influenced by the unpublished expression with which I am most familiar, namely my own. Unpublished expression, however, is at least as widely varied in its nature as what is published. It includes works like letters or memos, which have been disseminated but not "published" for purposes of the Copyright Act and which Judge Miner last year suggested to the Subcommittee -- rightly in my view -- are less deserving of protection because the author has guarded his or her words less jealously. On the other hand, it also includes expression so intimate that its authors undoubtedly could not bear without great emotional upheaval to see it reviewed - much less repeated - by any other person on earth. This variety argues for flexibility in the creation of applicable standards, recognizing the fact-bound nature of virtually every instance of purported fair use. I realize that this kind of case-by-case approach which is required now and would remain the rule under H.R. 2372 may chill some secondary-text authors from legitimate fair use because they are unwilling to bear the risk of litigation, with its high costs -- emotional as well as financial -- and delay. I believe that is a cost worth incurring and that the law, as H.R. 2372 does, should avoid rules of absolute prohibition, but should also continue to regard the fact that a work is unpublished as an important factor weighing against fair use.

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Mr. **Hughes**. Mr. Turow, as an author, do you feel that the right of an artist to choose the circumstances of publication should include the right not to publish at all?

Mr. **Turow**. I believe that profoundly, Mr. Chairman. I think that it is one of the essences of free expression not only to speak and, if you are fortunate enough, to be heard, but also to choose not to speak. And to choose the circumstances under which your words reach the public forum has got to be an absolutely fundamental right of authorship.

Mr. **Hughes**. Let me see if I can't summarize your testimony. You argue in your statement that title I of H.R. 2372 is probably unnecessary. But it is also unobjectionable because it merely clarifies that the unpublished nature of expression is an important element which tends to weigh against the finding of fair use. Is that a fair summary?

Mr. **Turow**. Yes, sir. That is a very fair summary of my position.

Mr. **Hughes**. If you had to choose between doing nothing and processing a piece of legislation that attempts to clarify what I think most, except for a couple of decisions in the second circuit and some dicta, would seem to indicate to the contrary, what would you do? Would you legislate? Or would you leave it alone and let the courts basically attempt on a case-by-case basis to clarify exactly what the law is?

Mr. **Turow**. I recognize that both as a logical question based on my statement and one that I find difficult, because it really places me in the position of advising you on the kinds of prudential judgments that you are far better experienced at making than I am.

I must admit that I am troubled looking at some of the statements that have been submitted to the committee, because I think they read this legislation far more broadly than the words would seem to allow. And I am, frankly, disconcerted by the notion that a legislative history by implication may be read into the amendment.

I suppose, Mr. Chairman, to answer your question finally, if I were sitting in your seat I would probably be most inclined to do nothing and to let the case law mature.

Mr. **Hughes**. In that regard, let me just ask you some questions in your capacity as an attorney. Assuming that title I does not change current law, why would passage permit publishers and their attorneys to clear manuscripts presently being withheld? Are we being asked to legislate through legislative history that may or may not be supported in the language of the statute? Assuming that litigation ensues, do we expect that the courts would consult the legislative history and move the statutory language? What are your answers?

Mr. **Turow**. I must say that I have had conversations in the last week or so where I have tried to get publishers' lawyers to explain to me what they think is gained by this legislation, and, frankly, I am not persuaded by what I have heard.

The initial argument that was made in prior sessions of Congress was that the publishing industry sought a significant relaxation of the current restrictions on the use of unpublished material and they were going to accomplish that by equating unpublished and published work for fair use purposes. The result of the current legislation, in my mind, is that there is going to continue to be a case-by-case analysis. Those who perceived a per se rule against the use of unpublished material in the second circuit will, of course, find their minds somewhat at ease.

I never read those cases that way, so it is hard for me to share their pleasure in that result. And I must say that I think the normal reactions of most authors will be to shun the risk of litigation and to continue to make their fair use of unpublished material a very minimal one.

Again, I am less troubled by that because I think that is an appropriate result. But I do recognize that the real problem lies not in the fair use of my unpublished manuscripts but the difficulty that a historian faces in quoting from multiple unpublished sources where he or she does not even know where to go to ask for permission. So I recognize that it is a complex problem, but how this legislation is going to solve the problem that is at hand for publishers is beyond me.

Mr. HUGHES. Well, thank you. I have some other questions, but we have a full contingent this morning and I am going to yield to my colleague from California. But before I do so, I followed your story about your law professor with great interest and, of course, as a former prosecutor the first thing that occurred to me was that it wasn't a pencil it was an assault and battery. But what is more reassuring, I am happy to hear that others beside myself had witty professors in law school.

The gentleman from California.

Mr. MOORHEAD. Thank you. I think we have a full complement here because all of us have read your books.

Mr. TUROW. It is a great privilege to be here.

Mr. MOORHEAD. In your letter to Senator Hatch's Judiciary subcommittee staff you indicated that you were contemplating donating some of your materials to a library, but the legislation under consideration at that time would have made you unlikely to do so because of the unpredictable circumstances under which someone might attempt to make fair use of them. Is there anything in the current proposal that you believe would somehow inhibit authors from donating their materials to libraries?

Mr. TUROW. I certainly think, Congressman, that this proposal is much more reassuring than the proposals that were advanced in prior sessions. And I think that anyone who lets go of his or her original materials must be prepared for some fair use of them, but that was always the case, and certainly they do not have to face the kind of unfettered fair use that would have been invited by the prior language. And I do think that this bill, title I of H.R. 2372, goes a long way toward allaying concerns that had been raised by other legislative proposals.

Mr. MOORHEAD. Oftentimes creators of many things, of writings and sculptures or paintings or whatever it might be, just don't realize the value of what they have done. Like Michelangelo breaking off the arms of one of his Pietas because he thought it was worthless and later it being worth millions and millions of dollars. It may be that writings could have the same effect.

Mr. TUROW. Oh, there is no doubt about that.

Mr. MOORHEAD. Become very valuable later on, even though the man has passed on and they are just strictly unpublished works.

Mr. TUROW. "A Confederacy of Dunces," the novel that won the Pulitzer Prize, was an unpublished manuscript that had kicked around for years and yet that eventually found an enormous admiring audience. So your point is certainly proven again and again by literary history.

Mr. MOORHEAD. Last week we were told that general counsels to book and magazine publishers and broadcasters are reluctantly but almost uniformly advising their clients not to use unpublished works. So, even though you may think legislation is unnecessary, don't you agree that publishing experts are acting on a strong belief that they have a problem and that this problem is having a chilling effect on what is being published?

Mr. TUROW. I think that problem, Congressman, is that any time an author makes fair use of more than a phrase or two of an unpublished work a good lawyer would have to advise that author, that secondary text author, that there is a risk of litigation. That a court will have to apply a balancing test and determine whether or not this is fair use. And there is nothing that can be done about that, nor in my mind should there be anything done about that.

So I really come back to the answer that I gave to Chairman Hughes, which is I am not sure that this legislation will allay that problem, nor do I think it should because I think it is very important that there be a case-by-case determination. But, as a practicing lawyer who has to advise clients routinely on the cost of litigation, I know that the mere prospect of litigation is often daunting.

Mr. MOORHEAD. Well, I want to thank you for coming this morning. And you know, I would suspect that there would be millions of Americans that would rather see you handle just a few less cases in court and write a few more books because they are all interested in the next one.

Mr. TUROW. I appreciate the suggestion, Congressman.

Mr. HUGHES. The gentleman from Illinois, Mr. Sangmeister.

Mr. SANGMEISTER. As a member of the Illinois delegation, I certainly want to welcome you here. You have had a distinguished career which we have all followed. Not too many people speak about your times as an assistant district attorney, but you distinguished yourself there as well. And I welcome you here before the committee.

Mr. TUROW. Thank you.

Mr. SANGMEISTER. I have only one question which arose as I was sitting here listening to you and reading over your prepared text here. I understand from your written testimony and your oral testimony here today that it is not a matter of what monetary gain someone else may get out of using your unpublished works but you feel that this is an invasion of your personal privacy. And I say that, unless I am wrong, where you state, "I would not want anyone to publish a word of my law school diary," is that right?

Mr. TUROW. That is correct, Congressman. I must say that I don't think of it in a privacy rights kind of framework as much as I do in a sort of property law framework. It is mine and I am making that choice to exclude the world. But it certainly reaches to the heart of what we call either free expression or privacy, and probably well put as both.

Mr. SANGMEISTER. With no time limit on that whatsoever?

Mr. TUROW. There is a time limit that exists in the copyright laws, and when that time limit is past, if I choose not to destroy those materials, then they will pass into the domain of scholars and researchers to be freely used. But certainly during my lifetime, and whatever period beyond that the copyright laws will grant, I would rather have control of that.

And I think it makes sense, if you consider that I will have children who, God willing, will remain alive, that those kinds of reputational and privacy interests be protected.

Mr. SANGMEISTER. That is all I have.

Mr. HUGHES. Gentleman from Florida.

Mr. JAMES. Thank you. Thank you so much. This is a very interesting topic in many respects. I also appreciated your story about the—I think it was your law professor?

Mr. TUROW. Actually, my college English professor.

Mr. JAMES. Your college English professor. I related it to a law professor, one or two law professors. That had he stepped out the window I am afraid some of the class may have wished it was not the first story.

[Laughter.]

Mr. JAMES. One or more.

The concept that bothers me is in *Salinger* it says if the biographer copies more than a minimal amount of unpublished expressive content he deserves to be enjoined.

Mr. TUROW. Right.

Mr. JAMES. This bothers me. If you assume that the publication legally got circulated, published but not published in a formal sense. I assume they mean unpublished. It is obviously published because somebody else got their hands on it. You publish when you speak. I am publishing now. I am publishing if I talk in my room to myself. Perhaps not. There has to be at least one listener. So I don't see the distinction between speech and unpublished writings in the context of why one deserves protection over the other because once you speak it is presumed that you can quote what someone says, unless it is stolen or unless it gets into someone's hands illegally. In other words, I don't see why unpublished works, assuming they legally got into someone's hands, should be under that strict a standard.

Mr. TUROW. Well, let me give you some examples. First of all, I think the point that you are raising is one that I happen to agree with, which is that I personally do not believe that the restraints should be as strong on what Judge Minor refers to as disseminated material, such as the Salinger letters. All of these, anything that the author has not determined to release into the marketplace but which was copyrighted when it was first fixed in the tangible medium is regarded as unpublished.

But your point is very well taken that there are in practical terms great degrees of unpublishedness. And, as I say in the last page of my statement, I do agree with you that the restrictions should not be as strong on the fair use of materials such as letters or memos that have been voluntarily disseminated where the author knows that there is some risk that his or her words——

Mr. JAMES. Then, indeed, wouldn't it be fairer to have a standard that would deal with illegally or inappropriately seized material? I assume that an author keeps very close hold on his manuscripts. He may have a contractual right with a publisher, and some secretary or some person or indeed the publisher may disseminate it without the author's permission, but then that is a matter of contract and breach of contract for that to occur.

Mr. TUROW. Let me tell you a quick story, if I can, Congressman. It is now routine in New York publishing houses, because of the ferocious appetite of Hollywood, for many studios to have somebody who I assume is paid, but somebody on the inside of publishing houses, not generally a high official, I think, who bootlegs manuscripts out of publishing houses long before they are published. Both of my novels were in the hands of people in Hollywood long before I had ever given anyone permission to be circulating them there.

So there is concern about what happens with unpublished works in that kind of context, and I am sure the examples are numerous.

Mr. JAMES. But, indeed, doesn't the present law or status quo take care of that scenario because it really deals with piracy, so to speak, or with the using of an unpublished work where the essence of it is conspiracy or the breach of a contract or the illegal taking of unpublished works? That is taken care of under the law without this dramatic apparent change in this opinion. That is on a different legal basis, which is why I think you have an enforceable right there. But once you admittedly have released to the public unpublished works, disseminated, if you will, with no restrictions, no apparent restrictions, then it would seem like the status quo of the law would take care of that.

But to go so far as to give unpublished written work a whole different elevation than it has ever had before, which copyright law has not done to this point, neither does patent law do the same thing with inventors, neither does the law of prohibition against the spoken word do the same thing, it seems to me like you are creating an unnecessary tier of protection of the spoken word reduced to writing that perhaps would be injurious to research, et cetera.

Mr. TUROW. I don't think I can completely agree with the historical note, though I certainly am not an expert. But just looking at the Nation case, I think what the Supreme Court teaches us is that although works were disseminated, the bar on the use of unpublished work under the common law was absolute. Because these were equitable proceedings to enjoin, the fact that a work had been disseminated or publicly performed, as, for example, with a play that hadn't been published, was considered an equitable factor that might weigh against an injunction. And all frankly that I believe is appropriate is that this matter continue to be remitted to the sound judgment of the district court judges, bearing in mind the kinds of factors that you are pointing to that obviously do not compel the same level of protection as the inadvertent publication of somebody's very private diaries, for example.

Mr. JAMES. I suppose I am a little bit sensitive because being in public life you can only hope—being repeated is not the great problem. The great problem is being incorrectly having facts and statements attributed to you.

Mr. TUROW. Yes, I understand.

Mr. JAMES. And in that situation the burden is on you to show total reckless disregard for the truth, et cetera, so it is a whole different perspective for being misquoted. I know it is not under the law related——

Mr. TUROW. Well, it is related in a way. In the sense that many of the historians and scholars who have come before this subcommittee cite the advantages to accuracy of the brief quotations they want to make from unpublished materials. In looking at some of these statements I smiled and I said to myself, "I wonder how many of these Congressmen and Senators who have had the experience of being briefly quoted will believe that brief quotation always serves the interest of accuracy."

Mr. JAMES. You beg not to be paraphrased. In fact, many in public life instead of responding verbally sometimes to an inquiry will take the question and fax the answer.

Mr. TUROW. Yes. I can understand that.

Mr. JAMES. And hope that you are directly quoted.

Thank you so much for your testimony. It is very helpful. Thank you.

Mr. HUGHES. The gentleman from North Carolina.

Mr. COBLE. Mr. Chairman, I apologize for my belated arrival. I had another meeting.

Mr. HUGHES. We are just delighted to have the gentleman.

Mr. COBLE. Mr. Turow, two or three of my colleagues have alluded to your professorial story or joke. I regret that I missed that. Perhaps someone will enlighten me as the day goes on.

Mr. Chairman, the bell has rung, and I think most of the questions I had have already been touched on. So, for the moment, I have no questions.

Mr. HUGHES. Well, thank you very much, Mr. Turow. Your statement was very thoughtful. Your full statement was very comprehensive and incisive, and we appreciate that. And we do wrestle with the question of just what we would be doing basically by passing the legislation, but I am satisfied just from the testimony that we have heard that it has presented some problems for some publishers, and it is always going to be a problem as you indicate. Lawyers are going to have to advise their clients that there is always a risk of litigation, just depending upon a whole host of factors. The only question is whether or not we need to do something to attempt to restore, you know, to the literary environment all the factors that we want considered as has been the case prior to recent decisions in the circuit court, and that is the issue really.

Mr. TUROW. Well, I thank you for giving me the opportunity to present my views on that issue, and I wish you well in your deliberations on that difficult question.

Mr. HUGHES. Thank you very much. I wish you well. And I promise I will read the balance of "The Burden of Proof" very shortly.

Mr. TUROW. Thank you kindly, Mr. Chairman.

Mr. HUGHES. Thank you. Good luck to you.

The subcommittee stands recessed for about 10 minutes while we catch this vote.

[Recess.]

Mr. HUGHES. The subcommittee will come to order.

Now, I would like to introduce my friend and ofttimes a witness before the committee, the Honorable Ralph Oman, Register of Copyrights and Associate Librarian of Congress for Copyright Services. Under Ralph's able leadership the Copyright Office has been of great assistance to the subcommittee, and indeed to the entire Congress, on the vexing copyright issues that we daily face in a constantly changing society.

Ralph is accompanied by William Patry, a policy adviser in the Copyright Office. Bill is the author of a book entitled "The Fair Use Privilege in Copyright Law." His scholarly analysis was cited by the Supreme Court in the *Harper & Row* decision. Mr. Oman is also accompanied by other staffers, and we will ask him to introduce them for us.

We have your prepared text, Ralph. Without objection, it will be made a part of the record. We hope you can summarize for us today. And please introduce those with you today at the counsel table.

STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS AND ASSOCIATE LIBRARIAN, LIBRARY OF CONGRESS, ACCOMPANIED BY WILLIAM PATRY, POLICY PLANNING ADVISER TO THE REGISTER; ERIC SCHWARTZ, POLICY PLANNING ADVISER TO THE REGISTER; AND MARILYN KRETSINGER, ASSISTANT GENERAL COUNSEL

Mr. OMAN. Thank you, Mr. Chairman. And thank you very much for those kind words. I will, in fact, summarize my statement.

Let me introduce two lawyers on my right, Eric Schwartz, Policy Planning Adviser to the Register, and Marilyn Kretsinger, the Assistant General Counsel.

Although my statement covers all three titles of H.R. 2372, I will focus my oral remarks on title I, the fair use section of the bill. Let me just mention in passing that title II of the bill provides for automatic renewal of copyrights secured on or after January 1, 1963, and before January 1, 1978. Under the current system, valuable copyrights are inadvertently lost forever by people who are not schooled in the arcane renewal system that we have in place that was developed under the 1909 act. This is, in my view, compassionate legislation and the Copyright Office supports its passage.

Title III, Mr. Chairman, consists of a proposal submitted by the Librarian of Congress—my boss—to revise and extend the National Film Preservation Act of 1988. And, as you can imagine, I support that proposal.

[Laughter.]

Mr. OMAN. This provision focuses on film preservation and has the support of a broad spectrum of the creative community.

Now, let me turn to title I, the fair use provision. As you have indicated in introducing H.R. 2372, this provision would amend section 107 of the Copyright Act to, in your words, "clarify the intent of Congress that the fact that a work is unpublished should continue to be only one of several considerations that the courts must weigh in making fair use determinations."

Your bill, and bills introduced last session by Mr. Kastenmeier and Senator Simon, were intended to counter some dicta in two decisions by the U.S. Court of Appeals in the second circuit. We are talking about the *Salinger* and the *New Era* cases. This bill and Senator Simon's new bill differ in a number of important respects from last year's bills, and those differences represent, in my view, a great improvement.

So, if the subcommittee concludes that legislative action is called for and, like Mr. Turow, I will defer to your judgment in making this assessment, the Copyright Office supports the current draft.

To make your legislative correction as useful as possible, I would urge you to state clearly in the legislative history that you affirm the Supreme Court's decision in *Harper & Row* v. *the Nation,* and that you do not intend to eliminate the court's ability to look at factors outside of the four enumerated factors in section 107, including the author's right of privacy. With this legislative history and some minor tinkering with the language of the bill, H.R. 2372 will accomplish the stated goal of keeping the fair use doctrine relatively flexible, thereby permitting judges enough discretion to fashion decisions that adequately protect the interest of both authors and the public.

Nevertheless, I would not dismiss out of hand, Mr. Chairman, the contention of some experts that this issue has not yet reached that point of ripeness that calls for a quick legislative fix, at least not right now. While the Supreme Court refused to hear the *Salinger* and *New Era* appeals, that refusal is in many ways understandable. The *Salinger* case involved a preliminary injunction. The *New Era* case was appealed by the prevailing party who was complaining about dicta, and that is not generally the type of case that the Supreme Court grants certiorari for.

The lower courts themselves seem to be fine tuning the decisions that caused so much alarm. This is the beauty of the common law approach to jurisprudence, Mr. Chairman, as this subcommittee with its jurisdiction over courts and judges knows so well. You have a great appreciation for how judge—made law grows and matures. You also have the best sense of when you should step in with pistols blazing and tell the courts when they have strayed from congressional intent. You may conclude that now is the time. I urge you to make absolutely certain that in doing so we don't start down a road that somehow transforms the fair use doctrine from a flexible rule of reason test into an ever-growing laundry list that protects specialized interests.

I think the second circuit knows it caused some very serious problems with its loose language in the *Salinger* and the *New Era* opinions. Influential judges of that court, including the author of the *Salinger* opinion, have gone to extraordinary lengths in en banc opinions, law review articles and speeches, to reassure authors and publishers that courts could find fair use of unpublished works. Most of the controversial language in *Salinger* was retracted in the en banc opinions in the *New Era* case.

The district courts in the second circuit have also listened to these revisionary opinions. No decision subsequent to those decisions has flatly rejected fair use of unpublished works since last year's hearing. Some witnesses last week sought to minimize the importance of these victories by stating that the decisions were, in fact, limited to their narrow facts. I might note, Mr. Chairman, that this is the way the courts usually decide cases, and that is now they decided *Salinger* and *New Era*. They limited their decisions to the facts.

Despite these reservations, Mr. Chairman, I do not take lightly the problems biographers and historians face. I understand that they are out there on the firing line having to make important decisions right now. They can't wait for months or years for the second circuit to fine-tune fair use. Even so, I note that biographers, historians and their lawyers and publishers have to make these hard judgment calls all the time, not only with fair use but with libel law as well. In many ways, they go with the territory. They are inherent in the balancing required by the fair use defense, and the lack of absolute certainly will trouble authors and publishers even if you pass H.R. 2372 in its present form.

Last week, some of the publishing witnesses told you that publishers regularly make these tough judgment calls. They also told you that what is different about copyright cases is the injunction remedy. Witness after witness complained about injunctions. The most troublesome language in the *Salinger* opinion—Judge Newman's statement that infringers deserve to been joined—has been explicitly repudiated by both Judge Newman and by the second circuit in its published opinions.

I should also note, Mr. Chairman, that in the *Salinger* case itself, the court noted that there would have been a serious question as to whether or not the use of the Salinger letters by Ian Hamilton would have constituted fair use even if the Salinger letters had been published. So we are not faced with a clear issue in that case especially.

I do question, Mr. Chairman, what the actual purpose of the bill is. I think Mr. Turow raised this same question, wondering what the bill will accomplish. If it just restates the current law, why are we going through this exercise? If the bill does change or clarify the law, I would like to know with more specificity how it does so and whether or not in doing so the legitimate interests of the original author will suffer and whether or not it creates any retroactivity problems. I know Mr. Moorhead in last week's hearing raised the question of retroactivity, and he was, I think, told that it does raise some serious problems.

Let me also note before concluding, Mr. Chairman, a possible unintended consequence. Passage of title I of H.R. 2372 could encourage future efforts to transform the fair use doctrine into a detailed, rigid Napoleonic code-like provision in which specialized users of copyrighted material somehow jockey to get their own needs taken care of. This is something we should guard against.

But if, in fact, you decide to move ahead with the bill, I urge you to exercise your usual caution in drafting the legislative history. Congress, of course, writes legislative history as an important part of the record, but some people may mistakenly view the legislative history as an opportunity to put a slightly different spin on *Harper & Row* v. *The Nation*. I am particularly concerned that some people want to characterize *Harper & Row* narrowly as a scooping case. And by using the expression "scooping," I mean that fair use prevents the use of an author's unpublished material only if the author intends to publish his or her work and only if the publication scoops the original author in the sense that the excerpts steal the thunder of the book's potential to make tomorrow's headlines or next week's headlines. This was, obviously, the fact pattern with President Ford's memoirs.

I don't think that is a proper reading of *Harper & Row*, and I believe that it would have the effect of reading out of fair use its important privacy component.

That concludes my statement, Mr. Chairman. I note in conclusion that no decision since last year's hearing has flatly rejected fair use of unpublished work. In the *Richard Wright* case, which was mentioned by Mr. Turow, involving a biography of the famous author that used unpublished letters that had been sent to the biographer, the court actually weighed the unpublished nature of the work in the biographer's favor.

In short, the common law system that we all live with, for better or for worse, our common law system of jurisprudence which is so well appreciated by the subcommittee, may in fact be lumbering toward a correct solution to this dilemma. But, if you decide to gently nudge the courts toward what you see as the desired result, Mr. Chairman, H.R. 2372 will accomplish that objective, and the Copyright Office would support it.

Thank you very much. I would be prepared and pleased to answer any questions.

Mr. HUGHES. Thank you very much, Mr. Oman, for as usual an excellent, very incisive statement, both written and oral.

[The prepared statement of Mr. Oman follows:]

PREPARED STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS, AND ASSOCIATE LIBRARIAN, LIBRARY OF CONGRESS

Introduction

The Copyright Office appreciates the opportunity to testify today on H.R. 2372, a bill introduced by Chairman Hughes and Mr. Moorhead. H.R. 2372 consists of three titles. Title I amends the fair use provision of the Copyright Act, found in Section 107. Title II provides for automatic renewal of copyrights secured on or after January 1, 1963 and before January 1, 1978, the general effective date of the 1976 Copyright Act. Title III consists of a proposal submitted by the Librarian of Congress to revise and extend the National Film Preservation Act of 1988.

TITLE I: FAIR USE

Title I of H.R. 2372 would amend Section 107 of title 17, United States Code, by adding at the end of that section the following:

> The fact that a work is unpublished is an important element which tends to weigh against a finding of fair use, but shall not diminish the importance traditionally accorded to any other consideration under this section, and shall not bar a finding of fair use if such finding is made upon full consideration of all the factors set forth in paragraphs (1) through (4).

This proposal is similar to S. 1035, introduced by Senators Simon, Leahy, Hatch, DeConcini, Kennedy, Kohl, and Brown. The differences between the two are minimal. S. 1035 speaks of "all the above factors," while H.R. 2372 refers to "all the factors set forth in paragraphs (1) through (4)." The Copyright Office prefers the Senate formulation because the House version may be read as prohibiting courts from weighing factors such as the defendant's lack of good faith and method of acquiring the work, as well as privacy considerations.

The purpose of the amendment is to "clarify the intent of Congress that the fact a work is unpublished should continue to be only one of several considerations that courts must weigh in making fair use determinations." The Chairman's bill, like bills introduced last session by Mr. Kastenmeier and Senator Simon, is stated to be a reaction to dicta in two decisions from the United States Court of Appeals for the Second Circuit in New York -- Salinger v. Random House and New Era Publications v. Henry Holt & Co. This bill and Senator Simon's new bill differ in a number of respects from last year's bills, and those differences represent a great improvement.

As with any legislative proposal, Congress should be convinced that a legislative solution is required and that the bill being considered represents the best possible solution to the problem. If the Subcommittee concludes that legislative action is called for, the Copyright Office supports the present formulation. To make your legislative correction as useful as possible, I would urge that you state clearly in the legislative history that you affirm the Supreme Court's decision in Harper & Row v. Nation Enterprises, and do not intend to eliminate the courts' ability to look at factors outside of the four enumerated in Section 107, including authors' right to privacy. With this legislative history and the minor tinkering with the language of the bill noted above, H.R. 2372 will accomplish the stated goal of keeping the fair use doctrine relatively flexible, thereby permitting judges enough discretion to fashion decisions that adequately protect the interests of both authors and the public.

Nevertheless, I would not dismiss out of hand the contention of some experts that this issue has not yet reached the point of ripeness that calls for a quick legislative fix right now. While the Supreme Court did refuse to hear the Salinger and New Era decisions, that refusal is understandable. Both cases involved preliminary injunctions. New Era was appealed by the prevailing party, complaining about dicta -- hardly the type of proceeding in which the Supreme Court normally grants certiorari. The lower courts themselves seem to be fine-tuning the decisions that caused so much alarm. That correction process is the beauty of the common law approach to jurisprudence. As the subcommittee with the jurisdiction over courts and judges, you have a great appreciation for the way judge-made law grows and matures. You also have the best sense of when you should step in with pistols blazing and tell the courts that they have strayed from congressional intent. You may conclude that now's the time. But I would urge you to make absolutely certain that in doing so you don't start down a road that might transform fair use from a flexible, rule-of-reason test to an ever-growing laundry list that protects specialized interests.

The Second Circuit knows it caused problems with its loose language in the *Salinger* opinion and in the *New Era* panel opinion. Influential judges of that court, including the author of the *Salinger* opinion, have gone to extraordinary, unprecedented lengths in *en banc* opinions, law review articles, and speeches to reassure authors and publishers that courts could find fair use of unpublished works. Most of the controversial language in *Salinger* was retracted in the *en banc* opinions in *New Era*.

The district courts in New York have listened. No decision since last year's hearing has flatly rejected fair use of unpublished works. One of these decisions, involving a biography of Richard Wright that reproduced unpublished letters sent to the biographer, held that "[t]here is a strong presumption that if the allegedly infringing work is a biography, factor one favors the biographer,"[1] and actually weighed the second factor -- the unpublished nature of the work -- in the biographer's favor.[2] The court then proceeded to weigh the remaining two factors in the biographer's favor as well. Another district court decision in New York, in a recent case involving unpublished training manuals for a course on the "clarification of consciousness," weighed the unpublished nature of the work against the defendant, but nevertheless found fair use because the other three factors weighed in her favor.

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[1] *Wright v. Warner Books, Inc.*, 748 F. Supp. 105, 108 (S.D.N.Y. 1990)(appeal argued May 29, 1991).

[2] *Id.* at 108-112.

And, in analyzing the second factor, the court accorded unpublished works only "greater protection," citing *Harper & Row*, not *Salinger* or *New Era*.[3]

The Second Circuit itself, in a case decided in March of this year, while agreeing that the unpublished nature of the Medical College Admissions Test weighed in plaintiff's favor, vacated the district court's grant of summary judgment rejecting fair use, ruling that the lower court had erred in its consideration of the market effect factor -- hardly the action of a circuit operating under a "virtual" *per se* rule prohibiting fair use of unpublished works.[4]

A few witnesses last week sought to minimize the importance of these victories by stating that the decisions were limited to their narrow facts.[5] That is usually the way cases are decided, including *Salinger* and *New Era*. A close reading of the *Richard Wright* opinion shows that the court strongly sympathizes with biographers and historians.[6] I have appended a copy of the opinion to this statement. On May 24th, the Second Circuit heard oral argument in the appeal from the Richard Wright decision. An authoritative statement from the court of appeals in that case could further clarify the points addressed in this legislation.

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[3]. *Arica Institute, Inc. v. Palmer*, 1991 U.S. Dist. LEXIS 4731 (S.D.N.Y. filed April 10, 1991)(Patterson, J.).

[4]. *AAMC v. Cuomo*, 928 F.2d 519 (2d Cir. 1981).

[5]. One witness also testified that Congress should not pin too much hope on the Second Circuit appeal in the *Richard Wright* case since, according to the witness, the panel hearing the appeal did not give any indication they were willing to write a broad opinion tackling the issues before the Subcommittee. It is rare for any panel of a court of appeals to indicate the way in which it plans to write its opinion, in light of the simple fact that the vote on the outcome of the case is not taken or the opinion drafted until *after* the oral argument.

This issue goes back to the codification of fair use in the 1976 Act. At that time, Congress examined the question of fair use of unpublished works and stated that "[t]he applicability of the fair use doctrine to unpublished works is narrowly limited.... Under ordinary circumstances, the copyright owner's 'right of first publication' would outweigh any needs of reproduction...." In Harper & Row v. Nation Enterprises, the Supreme Court cited this report language in finding "The Nation" magazine's use of President Ford's unpublished autobiography to be an infringement, not a fair use. The judges in the Salinger and New Era cases understandably relied on Harper & Row and this legislative history in coming to their decisions.

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[6] In a case involving published works of L. Ron Hubbard, New Era Pubs., Aps v. Int'l Carol Pub. Group, 904 F.2d 152 (2d Cir. 1990), cert. denied, 111 S. Ct. 297 (1991)(New Era II), a panel of the Second Circuit cited the original language in Harper & Row that "the scope of fair use is narrower with respect to unpublished works," relegating Salinger and New Era to "see also" status. Id. at 157. The panel could not have been unaware of the controversy over those two decisions' interpretation of Harper & Row as ordinarily giving unpublished works "complete protection" against fair use. Regarding the first factor, the purpose of the use, the opinion rejected an argument, based on New Era I, that "copying for purposes of demonstrating character defects cannot amount to fair use." Id. at 156, and upheld the biographer's claim of fair use.

When we discuss whether or not these decisions unreasonably restrict use of unpublished materials, we should not forget that before the 1976 Act, authors enjoyed a perpetual common law right in their unpublished works that protected them generally against any fair use. These are the very works that biographers and historians now wish to use. The 1976 Act took away that perpetual right in exchange for federal protection and remedies, but at the same time Congress was careful to state expressly that it did not intend to change the common law rules on fair use. I am aware Mr. Abrams testified last week that state criminal codes or right of privacy laws might still be applicable, but I have my doubts. Mr. Abrams himself successfully argued before the Second Circuit in Harper & Row that a state law claim for conversion of President Ford's unpublished manuscript was preempted by the 1976 Copyright Act, and I have no doubt whatsoever that any state law or cause of action that provides equivalent rights for the copying or publication of copyrighted works would also be preempted. So it's the copyright law or nothing. In light of the inability to turn to state law, the right of privacy component of the fair use doctrine plays a critical role that should not be disturbed.

Some of the witnesses at last week's hearing expressed an opinion that the rules on writing biographies and histories had been fundamentally changed as a result of the Salinger and New Era decisions and that books that had previously been published under the "old rules" could not be written today. In fact, the law prior to 1978 (the general effective date of the 1976 Act) was even more restrictive than the Salinger and New Era decisions. Yet, biographies and histories were written before 1978 using, without permission, unpublished material without litigation. Even in the chill of the post-New Era era, some biographers and historians are contiuing to do so without permission, and are not being sued. What I believe has happened as a result of the Second Circuit's decisions is a greater awareness that litigation may result from use of unpublished material and an understandable heightened caution by counsel. The law itself has not fundamentally changed.

I hope that biographers and historians do not mistakenly believe H.R. 2372 will provide them with guidelines that will help decide whether a particular use of unpublished material is a fair use.[7] Nothing in H.R. 2372 will provide biographers with clear guideposts, and, indeed, no lawyer would ever be able to provide an ironclad assurance as to what constitutes "fair use." As a matter of fact, I doubt that a lawyer could have provided those assurances on "the day after Harper & Row," the time period to which some people think H.R. 2372 will return us.

From reviewing the statements submitted to you last week, I also have come to the conclusion that many biographers and historians do not understand that both unpublished and published

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[7] See Statement of Kati Marton at p. 1 ("Without a reasonable agreement on what constitutes the 'fair use' of unpublished materials, we will be reduced to the status of 'court biographers ...").

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works, including memoranda and letters, written by government officials in the course of their employment, are in the public domain, free for all to use. Nor do they understand that all the facts and ideas -- the stuff of the First Amendment -- can be copied without any liability, regardless of whether the work that contains them is published or unpublished.

I nevertheless agree with authors and publishers who say that some of the language in the Second Circuit's opinions went too far in interpreting Harper & Row. But I do not agree with those who say that those decisions were aberrations, or, with respect to Salinger, even that it was wrongly decided. People tend to forget that in Salinger, the court expressed strong doubts that the fair use doctrine would have permitted Salinger's biographer to copy such large chunks of the famous author's letters, even if they had been published. At the hearing last week, no one mentioned the fact that fair use is an affirmative defense. It only comes into play only if the plaintiff makes out a prima facie case of infringement, requiring proof that the defendant copied a substantial amount of copyrightable expression. The Second Circuit judges and district judges in the Southern District of New York all agree that the minimal taking of unpublished expression does not give rise to a prima facie case of infringement. The judges also agree that fair use permits an even greater taking of unpublished expression. Neither the general law of copyright infringement nor the Second Circuit's fair use decisions bars the taking of even one word of unpublished material. You can take minimal amounts of unpublished expression. The real question is how much you can take and under what circumstances. Congress did the best it could to legislate an answer to that question in 1976. H.R. 2372 does not attempt to improve upon that balanced formulation.

Even so, I do not take lightly the problems the bill's advocates face. I understand that they are on the firing line in making important decisions now, not after the Second Circuit may or may not fine-tune fair use. Biographers, historians, and their lawyers and publishers have to make these judgment calls all the time, not only with fair use but with libel law as well. They go with the territory. They are inherent in the balancing required by the fair use defense, and the lack of absolute certainty will trouble authors and publishers even if you pass H.R. 2372. Last week, the publishing witnesses told you that publishers regularly make tough judgment calls. They also told you that what is different about copyright cases is the injunction remedy. Witness after witness complained about injunctions. Of course, nothing in the bill would change the law on injunctions. The most troublesome language in the *Salinger* opinion -- Judge Newman's statement that infringers deserve to be enjoined -- has been repudiated by both Judge Newman and the Second Circuit in published opinions.

What does the bill accomplish then? If it just restates the law, why legislate? If the bill does change the law, I would like to know how it does so, whether or not the legitimate interests of the original authors will suffer, and whether or not it creates any retroactivity problems. Mr. Moorhead raised this question last week and met with acknowledgment that it was a serious issue.

I also note a possible unintended consequence. Passage of title I of H.R. 2372 may encourage future efforts to transform the fair use doctrine into a detailed, rigid, Napoleonic Code-like provision in which specialized users of copyrighted material jockey to get their own subsection.

If you do decide to move ahead with the bill, I urge you to exercise your usual caution in drafting legislative history. From the beginning, some people viewed the legislative history as the real opportunity to put a slightly different spin on Harper & Row. I am particularly concerned if the Report were to characterize Harper & Row narrowly as a "scooping" case. In other words, fair use prevents the use of an author's unpublished material only if the author intends to publish his or her work and only if the publication "scoops" the original author in the sense that the excerpts steal the thunder of the book's potential to make tomorrow's or next week's headlines. I don't think that is a proper reading of Harper & Row, and I believe that it will have the effect -- intentional or not -- of reading out of fair use its important privacy component.

Decisions Since Last Year's Hearing

At the joint hearing held on July 11, 1990 on Representative Kastenmeier's and Senator Simon's bills, the Copyright Office submitted a written statement containing a historical overview of the origins and development of fair use, as well as an analysis of recent case law, including the *Salinger* and *New Era* decisions. Rather than repeat that lengthy material, we refer the Subcommittee to the printed hearing record.[8] In this section, we provide an analysis of the cases decided since the hearing.

Association of American Medical Colleges v. Cuomo

The most recent Second Circuit decision on fair use of unpublished works is *Association of American Medical Colleges v. Cuomo*.[9] The opinion, written by Judge Altimari for himself, Judge Mahoney, and United States District Judge Daly of Connecticut sitting by designation, reversed the judgment of the district court (McCurn, Chief Judge, Northern District of New York), vacated a permanent injunction, and remanded the case for further proceedings. The work at issue was the Medical College Admission Test. The dispute was over the disclosure requirements of New York State's Standardized Testing Act (STA), N.Y. Educ. L. §430 *et seq*. Those requirements mandated, *inter alia*, that testing agencies must file with the state copies of all test questions and answers. These questions and answers then became public records available for inspection and copying.

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[8] See *Fair Use and Unpublished Works: Hearing on S. 2370 and H.R. 4263 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary and the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 20-65 (1990).

[9] 928 F.2d 519 (2d Cir. 1991).

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The copyright owner, the Association of American Medical Colleges (AAMC), commenced an action for declaratory judgment and injunctive relief, alleging that the STA facilitated infringement and was preempted by the Copyright Act. Defendant argued fair use. The district court granted AAMC's motion for summary judgment, finding that the STA conflicted with the Copyright Act and that fair use was not available as a defense.[10] The unpublished nature of the MCAT and its status as a secure test were elements considered by the district court along with the remaining statutory factors, including harm to plaintiff's market.

In a troubling application of the fourth factor, the Second Circuit remanded the case, finding that it was inappropriate, on a motion for summary judgment, for the district court to have rejected expert testimony proffered by the State that disclosure and distribution of the secure test would not "seriously impair or even destroy the value of the copyrighted exams."[11] The court of appeals expressly rejected the district court's holding that secure test owners "should not be 'required to change its operations when another individual or entity is interfering with its ownership rights under the Federal Copyright Act in order to make the fair use exception fit.'"[12]

Secure tests are particularly vulnerable to having their value obliterated by unauthorized disclosure. The courts have, accordingly, been particularly solicitous in protecting these works.[13] Indeed, so far as we are aware, the courts have never upheld a fair use claim advanced by any private entity with regard to copying of secure tests or test questions. The courts' rejection of such fair use claims has been based not on any absolute rule that there can be no fair use of unpublished works, but on a recognition that advance disclosure of questions to test-takers can destroy their usefulness in measuring knowledge. The Second Circuit's decision in AAMC v. Cuomo dealt with a highly unusual set of circumstances: an assertion of fair use made by a state government seeking to require publication of secure tests. The court of appeals did not make any determination about whether or not the state's use of the MCAT was a fair use, but simply remanded the question to the district court for further proceedings.

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[10] 728 F. Supp. 873 (N.D.N.Y. 1990).

[11] 928 F.2d at 525, quoting 728 F. Supp. at 888.

[12] Id.

AAMC is noteworthy on at least two counts. First, the opinion was written by Judge Altimari. Judge Altimari joined Judge Miner's panel and en banc opinions in New Era, and thus would probably have been counted by the proponents of H.R. 2372 as unlikely ever to find fair use of unpublished materials. Second, even though AAMC involved highly sensitive unpublished materials -- secure tests -- the court carefully balanced other factors, including the public interest and the market effect. In short, the court did not give undue weight to any one factor, and instead engaged in exactly the kind of fact-intensive equitable balancing that Congress desires.

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[13] See AAMC v. Mikaelian, 571 F. Supp. 144, 153 (E.D. Pa. 1983), aff'd mem., 734 F.2d 6 (3d Cir. 1984); ETS v. Katzman, 793 F.2d 533, 543 (3d Cir. 1986).

Wright v. Warner Books, Inc.

The most significant judicial event since last July's hearing is the September 19, 1990 decision in Wright v.Warner Books, Inc.[14] written by Judge Walker of the Second Circuit. Judge Walker's careful opinion stands as powerful evidence that the envisioned threat to biographers and historians as a result of the dicta Salinger and New Era was vastly overstated. Principally at issue were letters written by author Richard Wright in the 1930s to Margaret Walker, excerpts of which Walker included in her biography, "Richard Wright Daemoni: Genius." Wright's widow sold the letters themselves to Yale University, but retained the copyright.

Judge Walker (no relation to the biographer) began his opinion by noting that the case "presents the next chapter in the continuing narrative of this Circuit's treatment of the fair use defense.... ."[15] He started his analysis of the four fair use factors by holding that "[t]here is a strong presumption that if the allegedly infringing work is a biography," factor one, the purpose of the use "favors the biographer," rejecting plaintiff's argument that defendant's failure to obtain Mrs. Wright's permission was relevant.[16]

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[14] 748 F. Supp. 105 (S.D.N.Y. 1990)(appeal argued May 29, 1991).

[15] 748 F. Supp. 105, 107 (S.D.N.Y. 1990)(appeal argued May 29, 1991).

The opinion's longest discussion concerns factor two, the nature of the work.[17] In that discussion Judge Walker directly confronted the problematic language in Salinger -- that unpublished works "normally enjoy complete protection against copying any protected expression."[18] According to Judge Walker, this language "compels two conclusions:"

> First, by saying "normally," the court refused to adopt a per se rule and left intact its instruction to proceed on a case-by-case basis; and second, the court sought to protect expression, not merely any facts that might be set forth in unpublished material.[19]

Needless to say, this interpretation of Salinger -- and by another Second Circuit judge -- is extremely helpful and favorable to biographers and historians. Even more helpful was Judge Walker's decision on the facts before him, for he actually resolved the second fair use factor in the biographer's favor despite the unpublished nature of the work, based on his finding that she had used the letters use of the letters "not to recreate Wright's creative expression, but simply to establish facts necessary to her biography . . . ."[20] This is precisely the sort of use that biographers and historians have testified that they need. The amount taken -- no more than 1 percent -- and the fact that it did not represent the heart of the work, resulted in the third factor being weighed in the biographer's favor as well. The fourth factor (harm to the potential market), which, citing Harper & Row, Judge Walker found to be "undoubtedly the single most important element of fair use,"[21] was also resolved in the biographer's favor. In addition to finding that plaintiff had not come forward with "the slightest evidence" that potential harm has occurred, Judge Walker also found that the biographer's paraphrasing to report facts "must remain available to a serious biographer."[22]

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[16] Id. at 108.

[17] Id. at 108-112.

[18] Id. at 111, quoting 811 F.2d at 97.

[19] Id. at 111.

In short, Judge Walker resolved all four factors in favor of the biographer, and thus found fair use. It is obvious from Judge Walker's stated awareness that his case represented the "next chapter" in the Second Circuit's treatment of fair use and the extremely favorable language he employed in describing biographers'needs, that he intended the opinion as a signal that the fears biographers and historians felt after New Era were unfounded.

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[20]. Id.

[21]. Id. at 112, quoting 471 U.S. at 566, 105 S.Ct. at 2233. Note that Judge Walker did not find the unpublished nature of the work to be the most important.

[22]. Id. at 113.

Arica Institute, Inc. v. Palmer

On April 10, 1991, Judge Patterson of the Southern District of New York issued the next opinion finding fair use of unpublished works, Arica Institute, Inc. v. Palmer.[23] At issue were unpublished training manuals used for seminars in the "clarification of consciousness." The defendant was a psychologist who wrote a book interpreting the Arica Institute theory in psycological terms. The book contained portions from plaintiff's manuals, as well as other sources.

In finding that fair use excused defendant's use, the court noted that the work's unpublished nature entitled it to "greater protection than published works," citing Harper & Row and not Salinger or New Era. Judge Patterson nevertheless resolved all three remaining factors in defendant's favor.

European Economic Community Software Directive

Last year's hearing was held at the same time that a debate was taking place within the European Economic Community over a proposed

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[23]. 1991 U.S. Dist. LEXIS 4731 (S.D.N.Y. filed April 10, 1991)(Patterson, J.).

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software directive designed to harmonize the laws of EC countries. The principal area of dispute concerned decompilation.[24] On May 14, 1991, the directive received its formal approval by the Council of Ministers. The twelve members of the community now have until January 1, 1993 to harmonize their national laws with the provisions of the Directive.

The Directive first requires protection for computer programs as literary works within the meaning of the Berne Convention, with at least the minimum Berne term of life of the author plus fifty years, or, in the case of computer programs created by juridical entities, 50 years from the date the work is lawfully made available to the public. Article 4 of the Directive grants authors exclusive rights to do or to authorize: (a) the permanent or temporary reproduction "by any means and in any form;" (b) the translation, adaptation, arrangement, or alteration of the program and (c) the right to control the distribution of the program, including rental.

Exceptions to these rights are contained in Articles 5 and 6. Article 5(1) permits, absent contractual restrictions to the contrary, exercise of one or more of the copyright owner's exclusive rights where "necessary for the use of a computer program by the lawful acquirer in accordance with its intended purpose, including for error correction." Article 5(2) permits the making of back-up copies. Article 5(3) permits owners and licensees of copies of a computer program to "observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program, if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do."

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[24]. Simply described, decompilation involves a detailed process of reverse engineering by which one takes the machine-readable form of a computer program (its object code), and by a series of electronic and human analyses, converts the machine-readable form into a kind of pseudo-source code. Source code is that form of software in which the computer programmer typically writes. It frequently contains trade secrets and other information of a sensitive, proprietary nature. While reverse engineering is generally permitted under trade secrets law, its permissibility under the Copyright Act is hotly debated.

Article 6 is entitled "Decompilation." Article 6(1) permits unauthorized reproduction of the code of a computer program and translation of its form if "indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs," provided three conditions are met. First, the decompilation is done by a licensee or other person having a right to use the copy, or on their behalf by a person authorized to do so. Second, the acts cannot be used for goals other than to achieve the interoperability of the independently created computer program, including the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright; and, the copy may not be given to others, except where necessary for interoperability. Third and finally, in accordance with the Berne Convention, the acts permitted by Article 6 may not be interpreted in a manner that unreasonably prejudices the copyright owners' legitimate interests, or conflicts with the normal exploitation of the work.

Experts in Europe have expressed the opinion that the focus of

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the debate will now shift to the national parliaments to ensure that there is compliance with the Directive.

Title II: Automatic Renewal

Renewal copyright registration is now mandatory for works copyrighted before 1978. In passing the general copyright revision bill of 1976, Congress retained the two-term system of copyright duration for works already under copyright protection. For pre-1978 works, unless renewal registration is timely made in the Copyright Office before expiration of the first term of copyright (which is the end of the calendar year of the 28th year of protection), the work falls into the public domain. Copyright expires.

Title II of H.R. 2372, the Copyright Renewal Act of 1991, would amend the Copyright Act to make renewal registration optional but allow for automatic extension of the copyright for the second term, even if registration is not made. The renewal copyright would vest in the person or persons entitled to the renewal under the statute on the last day of the first term. Earlier registration by the proper statutory claimant also would vest the renewal copyright and supersede the otherwise automatic vesting of rights on the last day of the first term. The bill establishes other incentives to encourage voluntary renewal registration, including a legal presumption of copyright validity for registered works, ordering of the rights in derivative works during the renewal term, and, if the renewal term vests automatically but registration is made later, evidentiary significance regarding the proper statutory claimant.

Copyright Renewal: Background

Arguably, the possibility of early termination of copyright protection if the author fails to make timely renewal registration with the Copyright Office is a harsh and inequitable feature of United States copyright law. This possibility exists for all works which secured federal copyright protection prior to January 1, 1978.. Unless the law is amended, copyright owners must make renewal registration until the year 2005, or the copyright in their works will expire at the end of the calendar year of the 28th year of copyright.

Under the 1909 Copyright Act, the term of protection was twenty-eight years from first publication or registration, with the possibility of a second twenty-eight year term upon renewal in the last year of the first copyright term. Ownership of the right to renew was set under the terms of the copyright statute. Except for certain special categories (e.g. posthumous works, composite works, and works for hire), the author was designated as the initial owner of the renewal right or, if deceased, the beneficiaries named in the statute, generally the widower or widow and children taking in a class. The renewal right was freely alienable, and, in practice, many authors were required to transfer their renewal interests in order to secure agreements to exploit their creations.

For a variety of reasons, problems have arisen regarding the functioning of the renewal provision. It is a highly technical provision which is difficult for even lawyers to understand. It creates considerable uncertainty in the orderly exploitation of intellectual property since it is inherently unclear who will possess the right of renewal until the renewal interest is vested by timely registration during the last year of the first copyright term. (Transferees who secure their renewal interest from the author take nothing if the author dies before copyright renewal can be registered.) The renewal provision has often been the subject of litigation as uncertainties have arisen over rights in highly valuable works. Authors, their widows or widowers and children often rely on others to manage their copyrights, and they suffer greatly when, through negligence or omission, there is failure to secure timely renewal registration.

During the 1960's and 1970's, Congress studies all aspects of the copyright law in the comprehensive revision effort; these efforts eventually culminated in the 1976 Copyright Act. On the subject of copyright renewal the respective Congressional subcommittees were highly critical. The reports identified the shortcomings of copyright renewal in the following terms: [25]

> One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright. Under a life-plus 50 system the renewal device would be inappropriate and unnecessary.

The shortcomings of copyright renewal, coupled with other reasons, led Congress to abolish the system prospectively in the 1976 Copyright Act. In its place, Congress established the termination procedure. For works that secured federal copyright protection under the 1909 Copyright Act (protection secured prior to January 1, 1978), however, the old system generally remains in effect. Congress retained the old system for subsisting copyrights because contingent rights had been transferred for value, and it would have been unfair and immensely confusing to cut off or alter those interests. [26] No one at that time proposed the innovative solution now found in H.R. 2372, which permits automatic vesting of the renewal interest without disturbing in any way the original statutory scheme for vesting the renewal in specified persons.

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[25] H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 134 (1976); Sen. Rep. No. 94-473, 94th Cong. 1st Sess. 117-118 (1975).

[26] H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. p. 139 (1976). It might also be unconstitutional, as a deprivation of property without due process.

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Support for the Renewal Proposal

In order to ascertain the level of support for modifying the renewal provision when the solution now included in H.R. 2372 was first suggested, the Copyright Office sponsored an informal meeting of affected industry members. Twenty-five organizations, representing authors, copyright proprietors, publishers, guilds, educators, and librarians, were invited to attend. The meeting was attended by approximately half of the invited organizations.

All organizations taking a position on the renewal proposal supported its adoption. As might be expected, organizations most closely associated with authors were the most enthusiastic. The representative from BMI, for example, gave a moving account of past injustices whereby performance royalties from renowned musical compositions were lost to an impoverished widow as a result of failure to make renewal registration. Representatives from education and libraries reserved their positions pending discussions with their members, but they later indicated they did not oppose automatic renewal.

After the meeting, several more communications were received by the Copyright Office. With one exception, all were supportive of the proposal. That exception consisted of a telephone call from a person in the business of distributing public domain motion pictures. He asserted that there was little interest on the part of copyright owners in distributing independent motion pictures of the type typically falling into the public domain, and that he provides a valuable service to the public by distributing public domain motion pictures.

Analysis of Title II

Title II would amend the Copyright Act to provide for automatic renewal of all pre-1978 works in which copyright subsists, for an extended further term of 47 years.[27] The person or entity entitled to the copyright in the renewal term would continue to have the option of filing for renewal registration within the last year of the first term of copyright. In some instances registration would determine the person(s) entitled to the renewal term. For example, if an author dies in the last year of the first copyright term after making renewal registration, his or her death would have no effect on the ownership of copyright in the second term. Any person or company to whom the author had assigned the copyright would own the copyright for the second term. On the other hand, if the author dies without making timely renewal registration, the author's statutory beneficiaries get ownership of the copyright in the renewal term, and the person or company to whom the author had assigned the rights does not get ownership of the renewal copyright. Under the bill, if renewal registration is not timely made, the rights in the renewal term will vest automatically upon the beginning of the renewal term in the person or entity entitled by statute to claim the renewal term on the last day of the original term of copyright.

The proposed statutory change would not impair contractual interests in "expectancies." Rights in the renewal term would revert to

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[27] Senator DeConcini introduced a companion bill in the Senate, S. 756.

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the purchaser of contingent rights if the contingency comes to fruition by the last day of the first term of copyright.

The bill encourages filing for renewal registration with the Copyright Office within the last year of the first term of copyright. If such claim is filed and registered, the certificate of registration constitutes prima facie evidence of the validity of the copyright during its renewed and extended term and of the facts stated in the certificate. An application to register a claim to the renewal term may also be made at any time during the renewal term as long as the claim is made in the name(s) of the vested statutory claimant(s). The evidentiary weight to be accorded the certificate of registration of a renewed and extended term of copyright made after the expiration of the first term of copyright shall be within the discretion of the court.

Filing a renewal application is not a condition of the renewal of the copyright in a work for a further term of 47 years.

The bill also provides that derivative works created in the first term can continue to be used in the second term without permission from the copyright owner where no renewal registration has been made within one year before the expiration of the original term. No new derivative works, however, could be created in the second term without permission from the copyright owner. This provision creates a right to use the derivative work that parallels the comparable right under the termination provisions for post-1977 works without overturning the decision of the Supreme Court in Stewart, et al. v. Abend, 14 USPQ 2d 1614 (U.S. 1990).

Finally, the bill provides for fines of up to $2,500 for any false representation in the application of copyright renewal registrations.

The proposed amendments apply only to those works copyrighted by publication with notice, or unpublished and registered with the Copyright Office between 1963 and December 31, 1977. Works that are in the public domain when the bill becomes law will remain in the public domain.

Title II of H.R. 2372 is soundly drafted and carries out the policy objectives noted by the Chairman in introducing the bill. The Copyright Office may suggest a few very technical improvements to the bill. For example, under SEC 202(b) ("Legal Effect of Renewal of Copyright is Unchanged"), the phrase "transfer or license of the further term" might better read "transfer or license of the copyright or other interest in the further term..."

Renewal Registration Statistics

The Copyright Office recently gathered statistics about the number of registration applications received in 1960-1962 and attempted a comparison with the number of renewal applications received for that group of registrations 28 years later. See Appendices 1-3. Under the 1909 Act a renewal application for a work published before January 1, 1978, the effective date of the 1976 Copyright Act, must be received during the 28th year of the first term of registration to extend registration for an additional 28 year term.

Classes with consistently significant levels of renewals include books, periodicals, dramas, musical compositions and motion pictures. At the time of the general revision in the 1960's, the Copyright Office estimated that approximately 15 percent of all works eligible for renewal are renewed annually. Our recent comparison of eligible works versus actual works renewed reveals a similar pattern, although at a somewhat higher 20 percent average rate of renewal. Specifically, for 1960 works, the rate of renewal in 1988 is 20 percent; for 1961 works, the 1989 renewal rate is 17 percent; and for 1962 works, the 1990 renewal rate is 22 percent.

Some fluctuation may be seen in figures for the various classes in various years. This is due in part to the fact that processing of renewals and original applications are done within different timeframes. Renewals are registered as of the date of receipt in the Office. The statistics regarding renewal registrations are derived, however, from records of renewals for which catalog entries have been made. The Cataloguing Division records reflect registrations made four to six months earlier. Thus, the annual figures for original term registration by subject matter cannot be matched exactly with the works for which renewal applications are logged in the 28th year of the first term of registration. However, by taking a three year sampling of registration numbers versus timely renewal numbers, the average figures run true to the proportion of works renewed as compared with the numbers of those works originally registered for copyright.

Not surprisingly, the statistics show higher average renewal rates for motion pictures and music. The rate of renewal for periodicals is higher than might have been expected. The most astounding statistics apparently show nearly 100 percent renewal of motion pictures in each of the three years analyzed. In fact, for two years, the rate exceeds 100 percent. In explanation of this finding, the Copyright Office notes that more than one renewal registration may be made for the same work of authorship.

The Copyright Office receives renewal applications that are known as "adverse claims" for many classes of works, particularly motion pictures. These are cases where more than one party claims copyright ownership of a work. Often the conflict concerns confusion about contractual agreements, licensing arrangements or inheritance rights. The Copyright Office does not make judgments in these matters, but rather accepts the applications for whatever legal value they may have.

Conclusions of the Copyright Office on Title II

The Copyright Office has long had concerns about early termination of copyright protection due to technical errors and oversights. The Congress apparently had similar sentiments when it eliminated copyright renewal for works securing copyright for the first time under the 1976 Copyright Act. However, due to the numerous contracts relating to contingent rights, Congress retained intact the

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renewal system of the 1909 Act.

At the time the renewal issue was being considered in the copyright revision process, no proposal was put forth which would have maintained the essence of the renewal system, while, at the same time, would have addressed the injustice of forfeiture. Numerous other copyright issues occupied the time of the respective Congressional subcommittees. H.R. 2372 addresses an issue which probably should have been dealt with at the time of revision, but, due to the enormity of the revision task, was not. There appears to be virtually universal agreement that the renewal provision frequently causes injustices. To the knowledge of the Copyright Office, no organization has stated its opposition to automatic renewal. The Copyright Office finds the proposal to be meritorious and in the public interest.

Title III: National Film Preservation Act of 1991

Title III of the Copyright Amendments Act (H.R. 2372) would reauthorize the National Film Preservation Act for 6 additional years. In 1988, Congress enacted the National Film Preservation Act of 1988 (Pub.L. 100-446) as an amendment to the Department of Interior and Related Agencies Appropriations Act, FY 1989. The provisions of the National Film Preservation Act expire on September 27, 1991.

The Act established a 13-member National Film Preservation Board, under the leadership of the Librarian Congress, for the purpose of selecting twenty-five films a year for each of three years. Films are eligible for selection if they are over 10 years old, and are of cultural, historical, or aesthetic significance. In accordance with the Act, the Librarian established guidelines and criteria for the selection of films into the National Film Registry (published in 55 Fed Reg 32566, August 9, 1990).

The titles of films selected are placed in the National Film Registry in the Library of Congress. To date, 50 films have been selected for inclusion in the National Film Registry. The last group of 25 films will be selected before the expiration of the Act in September.

The selection of the first 50 film titles has generated a considerable amount of public attention in two important areas. First, it has helped focus public attention on film as an American art form. Second, it has dramatized the importance of film preservation. As the Librarian has repeatedly pointed out, over half of the films produced before 1951 have been lost forever, including 80 percent of the silent films. Clearly attention must be focused on the importance of preserving and restoring the remaining films.

Films selected by the Librarian for the National Film Registry are received by gift in archival quality copies for maintenance in a special collection in the Library's film collection. The Library of Congress already has the largest film collection in the United States and is responsible for about half of the nation's film preservation efforts

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so it is a logical situs for the National Film Registry. The Library is currently locating and collecting archival quality materials for each of the first 50 films.

Film Labeling Guidelines

In addition to directing the Librarian to select and collect copies of the films, the 1988 Act required the Librarian to administer a controversial film labeling system. Under the provisions of the Act, all copies of selected films that are colorized, or otherwise materially altered, must be labeled in accordance with section 4 of the Act. For those films selected for the list, but not materially altered, the copyright owner or distributor may elect to display the seal of the Library of Congress on the film as evidence of its compliance with the guidelines. The bill provides enforcement provisions to prevent misuse of the seal and to ensure proper labeling when required.

For colorized films, the Act has worked fairly well, and there has been no disagreement about the application of the label. However, there has been a great deal of disagreement in Congress and among the Board members over the labeling requirements with regard to material alterations other than colorization.

Primarily, the disagreement has focused on the interpretation of congressional intent over the definition of a "material alteration" contained in section 11 of the Act. Some argue that this term should be read broadly to require labeling of the selected films in all cases where a film is altered for the purposes of further distribution on television or videocassettes.

Others argue that the language in the definition was meant to exempt most current practices from the labeling requirements because they are considered the "reasonable requirements" of distributing a work. The Librarian was charged with issuing final labeling guidelines, but his task was made more difficult by the manner in which the bill was passed--without hearings in the committees of jurisdiction and without any legislative history.

In November 1989, after many meetings with film owners, distributors, broadcasters and creative artists, the Librarian proposed film labeling guidelines (54 Fed Reg 49310, November 30, 1990). The proposal elicited eleven public comments. In light of the comments, changes were made, and the Librarian issued final labeling guidelines on August 9, 1990 (published in 55 Fed Reg 32567).

The published guidelines went into effect on September 24, 1990 for the first 25 films and on February 7, 1991 for the second 25 films (55 Fed Reg 52844, December 24, 1990). The guidelines are to be used by film owners, distributors, exhibitors and broadcasters in order to determine when a version of one of the films selected for inclusion in the National Film Registry, which is in their possession, has been colorized or otherwise materially altered and therefore must carry the required label.

In addition, these guidelines are to be used to determine the eligibility of the designated films to affix the seal of the Library of Congress' National Film Registry. The guidelines expire when the Act expires in September 1991.

In order to provide the most assistance to film owners and exhibitors, the labeling guidelines provide objective standards for altering films.

Reauthorization of the National Film Preservation Act

The enactment of the Act in 1988 was very controversial, and the resulting legislation was the product of many political compromises arrived at without the benefit of the expert scrutiny of the copyright committees in the House and Senate. In order to avoid a controversial reauthorization, the Librarian would like to continue the work of the Board in the areas where they have reached common ground -- on the film preservation efforts.

Therefore, in spite of the difficulties of the past few years, the Librarian decided to seek a reauthorization of the Act, which you have now introduced as Title III of H.R. 2372. It is the Librarian's view that any reauthorization should separate the issues of the physical preservation of film from the moral rights and labeling issues.

The Librarian feels that H.R. 2372 will help to consolidate our preservation efforts and work towards the development of a national plan in conjunction with the other major film archives. There is a lot that needs to be done just to preserve and restore our national film heritage.

and we can best accomplish this objective with a reauthorized and refocused National Film Preservation Board as provided for in H.R. 2372.

H.R. 2372 would provide for a six year reauthorization of the National Film Preservation Board. It would add four members to the current 13 member Board -- an archivist, a cinematographer, a theater owner, and one at-large member. It would call for a one year study, in conjunction with the other major archives on the current status of preservation, and it would move the focus of the Board onto important preservation issues and take a long hard look at the dissemination of older audiovisual works -- some still in their term of copyright protection, and others in the public domain. The Copyright Office fully supports the legislation as introduced.

The other difficult issues of labeling and moral rights should be given separate attention in your subcommittee and by the copyright subcommittee of the Senate. The Copyright Office can provide whatever assistance you need on this important issue to follow up on the 1989 study the Copyright Office prepared at the request of this subcommittee on the subject of moral rights in the motion picture industry.

Any reauthorization of the National Film Preservation Act that includes moral rights or labeling would be especially troubling to the Librarian of Congress if it requires him to enforce these provisions. The Librarian and I agree that the enforcement of labeling or moral rights would be best left to the individual parties and the courts. I know that the Librarian is very pleased that you have introduced H.R.

2372, and that you have removed these controversial issues from the legislation. When enacted, your bill will allow the Film Board to focus on the enrichment of America's film heritage with the full support of all of the organizations currently on the Board.

APPENDIX 1

COPYRIGHT REGISTRATIONS IN 1960 COMPARED WITH RENEWALS CATALOGUED IN 1988 [1]

FISCAL YEAR	ORIGINAL REGISTRATIONS		RENEWALS		PERCENTAGE
	Class	Number	Year	Number	
1960	A (books)	60,034	1988	9,128	15.2
1960	B (periodicals)	67,510	1988	10,037	14.9
1960	C (lectures)	835	1988	209	25.0
1960	D (dramas)	2,445	1988	428	7.5
1960	E (music)	65,558	1988	19,833	30.3
1960	F (maps)	1,812	1988	273	15.1
1960	G (work of art)	5,271	1988	307	5.8
1960	H (reprod. of work of art)	2,516	1988	232	9.2
1960	I (technical drawings)	768	1988	9	1.2
1960	J (photos)	842	1988	57	6.8
1960	K (commercial prints & labels)	11,485	1988	490	4.3
1960	L & M (motion pictures)	3,457	1988	3,586	103.7*
TOTAL		222,533		44,589	20.0(ave.)

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[1] Figures for fiscal years 1960, 1961 and 1962 are taken from the Report of the Register of Copyrights, 1963, from the table "Registration by Subject Matter Classes for the Fiscal Years 1956-1960". Figures for fiscal years 1988, 1989 and 1990 are taken from the Copyright Office's automated database "COPIX".

* For further details about the statistical bases for Appendices 1-3, see text *supra* at p. 29.

APPENDIX 2

COPYRIGHT REGISTRATIONS IN 1961 COMPARED WITH RENEWALS CATALOGUED IN 1989

FISCAL YEAR	ORIGINAL REGISTRATIONS		RENEWALS		PERCENTAGE
	Class	Number	Year	Number	
1961	A (books)	62,415	1989	7,197	11.5
1961	B (periodicals)	69,649	1989	8,499	12.2
1961	C (lectures)	1,029	1989	108	10.5
1961	D (dramas)	2,762	1989	361	13.1
1961	E (music)	65,500	1989	15,860	24.2
1961	F (maps)	2,010	1989	346	17.2
1961	G (work of art)	5,557	1989	394	7.1
1961	H (repro. of work of art)	3,255	1989	271	8.3
1961	I (technical drawings)	705	1989	4	0.6
1961	J (photos)	765	1989	6	0.8
1961	K (commercial prints & labels)	10,519	1989	722	6.9
1961	L & M (motion pictures)	4,654	1989	4,649	99.9*
TOTAL		228,820		38,417	16.8(ave.)

APPENDIX 3

COPYRIGHT REGISTRATIONS IN 1962 COMPARED WITH RENEWALS CATALOGUED IN 1990

FISCAL YEAR	ORIGINAL REGISTRATIONS		RENEWALS		PERCENTAGE
	Class	Number	Year	Number	
1962	A (books)	66,571	1990	9,967	15.0
1962	B (periodicals)	70,516	1990	9,995	14.2
1962	C (lectures)	875	1990	45	5.1
1962	D (dramas)	2,813	1990	491	17.5
1962	E (music)	67,612	1990	25,776	38.1
1962	F (maps)	2,073	1990	310	15.0
1962	G (work of art)	6,043	1990	569	9.4
1962	H (repro. of work of art)	3,726	1990	298	8.0
1962	I (technical drawings)	1,014	1990	0	0.0
1962	J (photos)	562	1990	28	5.0
1962	K (commercial prints & labels)	10,056	1990	522	5.2
1962	L & M (motion pictures)	3,641	1990	4,297	118.0*
TOTAL		235,502		52,298	22.2(ave.)

Ellen WRIGHT, Plaintiff,

v.

WARNER BOOKS, INC. and Margaret Walker, a/k/a Margaret Walker Alexander, Defendants.

No. 89 Civ. 3075 (JMW).

United States District Court,
S.D. New York.

Sept. 19, 1990.

Deceased author's widow brought copyright infringement action against biographer and publisher, for biographer's use of excerpts from published and unpublished works of author in biography. On motion of biographer and publisher for summary judgment, the District Court, Walker, Circuit Judge, sitting by designation, held that limited use of excerpts from author's works came within fair use doctrine.

Summary judgment granted in part; dismissed in part.

1. Copyrights and Intellectual Property ⇐56

Biography of deceased author was, without serious dispute, work of criticism

Mr. HUGHES. In your prepared statement, on page 10, you pose the rhetorical question to which you just alluded, and I quote: "If that [meaning the bill] just restates the law, why legislate?" The answer is we restate the law in order to get the message across that that is what we really meant. We do it all the time. We do it to tell the executive branch that they are not carrying out the law as we enacted it. We tell it to the courts. We did that just yesterday exactly when we took up the question of the civil rights bill once again.

In theory, legislating to reinforce a previously taken position may seem like an unnecessary gesture. However, as a longtime participant in legislative and political processes, do you really question the value and necessity of doing that from time to time?

Mr. OMAN. I always think that when there is some confusion in the courts it is useful to have clarification when it appears that the courts are incapable of correcting themselves. I am not convinced that this is the case in this particular issue.

Mr. HUGHES. Let me just follow up on that. I suppose the question is how long it is going to take, you know, for them to get around to correcting something that you might perceive to be incorrectly decided, even though it is dicta. But given the fact that it has had a chilling effect, and I have no reason to disbelieve some of the witnesses who have advised us that this had a chilling effect, what is wrong with restating basically as long as you are careful and surgical and, as you have indicated, if you create a legislative history that indicates that because we have evolving law, changed circumstances, the dynamics of change lend themselves to reminding the court that we want to balance all of the factors: Not just the four, but all the factors in a case, including the privacy factors which give you some concern.

What is wrong with that?

Mr. OMAN. I would support that if that is the purpose of this legislative midcourse correction, to make clear to the courts what you had originally intended. And I know some of the attorneys last week and some of the attorneys here today say that they will be able to use this midcourse correction to great effect in convincing judges, not only in the second circuit, but judges around the country, that this really is what you intended.

That is, of course, if you do intend to restate the law and not change the law. As I said in my statement to some people, who want to give a different spin to *Harper & Row* v. *The Nation*, this would not be a legislative clarification but it would be making new law in an area that does not lend itself to very precise guidelines. We are not going to be able to give them precise guideposts. That this is OK, that is not OK. It is an equitable doctrine. The courts are finding their way toward the correct result by trial and error in many ways, but that is the way the common law system works.

Mr. HUGHES. Well, I don't know that there is any sentiment for changing the law as such. I haven't heard any such sentiment. I have heard some concerns expressed that were very careful, making it clear that we want to put in place the kind of balancing that we have had prior to *New Era*.

And frankly, I share the sentiments of Mr. Turow. I am not so sure that we are ever going to so clarify that you are not going to have counsel advising their clients that there is a threat of litigation in this fair use area. Nor do I think as a matter of public policy it is good for us to eliminate that. I think that is important. That has been inherent in the law, and I think it is important to preserve that.

Getting to *Harper & Row,* I found it interesting that you are concerned that it not be perceived as a scooping case. However, you don't offer any advice to us as to how we should properly interpret or characterize that case. Instead, you merely state that scooping is not a proper reading of the case and that such a reading will have the effect, intentionally or not, of reading out fair use as an important privacy component.

What is the proper or appropriate interpretation of *Harper & Row?*

Mr. OMAN. Mr. Chairman, if you want a detailed, extended analysis, I would be happy to provide that in writing.

Mr. HUGHES. No, just briefly.

Mr. OMAN. Then let me ask Mr. Patry to sum it up in a couple of sentences for the record.

Mr. PATRY. I would think that you would not have to characterize it all. If you do characterize it, you might say that the Court evidenced considerable concern for the author's right of first publication, and that that right was recognized by the court as being the rule at common law and as codified in the 1976 act.

I think what our statement was directed at was attempts to characterize it, and that is really not necessary. The opinion stands for itself. There have been problems in interpreting it, and I think that is what certainly led to some of the difficulties.

Mr. HUGHES. Is the right of an author's first publication inherently a part of the question of whether or not he can be scooped?

Mr. PATRY. Yes.

Mr. HUGHES. I would think that is what we are talking about. It is the right of the author to first publish or decide not to publish. That is the inherent right.

Mr. PATRY. The Copyright Act gives the copyright owner right of distribution, and part of that is the right to determine when and under what circumstances the work is distributed. In the *Harper & Row* opinion, the Supreme Court noted, in fact, an important component of that is the author's ability to polish his or her expression and decide at what point their expression should become public.

I would also like to note that, as the chairman mentioned last week, fair use is an affirmative defense and it normally comes into play only after there has been a finding of substantial similarity of copyrightable expression. So that whether or not you are being scooped, you can still take all the ideas, all of the facts, all of the unprotectable elements, including government documents, that you want and you wouldn't even have to get to the issue of fair use, as you noted last week. The ability to scoop, the ability to take every single fact, every single idea from an unpublished manuscript is, in fact, preserved in the copyright law without regard to whether it is published or unpublished.

Mr. HUGHES. Mr. Oman, is title I of H.R. 2372, relating to fair use, compatible with the Berne Convention, in your judgment?

Mr. OMAN. Yes, Mr. Chairman, it is compatible. This issue was examined at some length in our statement last year and we have no reason to change that conclusion. That there are no problems with our compliance with the Berne Convention under these circumstances.

Mr. HUGHES. Should the law recognize a distinction when the owner of the unpublished work is a public figure and the proposed use is a biography, comment or criticism of that individual?

Mr. OMAN. If the public figure is a government official, certainly all of the materials that were generated in the course of his official or her official functioning in that capacity would be in the public domain in any case, so fair use would not be a factor.

Mr. HUGHES. Should it make any difference whether the author is living or dead?

Mr. OMAN. Of course, the copyright law ties the term of protection into the life of the author plus 50 years, so it would be a factor one way or the other. I do think that in terms of protecting the right of privacy, the concerns might be somewhat reduced after the death of the individual than they would be prior to the death of the individual.

Mr. HUGHES. Should the rules be different if the unpublished work is not one that appears to be science or the useful arts as contemplated in that language in the Constitution? For example, should lawyers be permitted to assert copyright and unpublished principles to resist discovery motions for business records in ordinary commercial litigation? As you know, it is happening with increasing frequency.

Mr. PATRY. If I may answer that.

Mr. OMAN. Mr. Patry.

Mr. PATRY. There was reference, indeed, last week to that issue. There was a case in Georgia, recently the Supreme Court decided another facet of it, *McClesky* v. *Zant,* in which an expert retained for the death penalty phase of the case tried to use copyright in a study they needed on the death penalty to exclude the other side from having access to it. And I think the Court in its wisdom looked at the fair use provision and said that under these circumstances it would facilitate judicial administration and, of course, the progress of science, to permit access and found, indeed, that the copying was fair use.

Mr. HUGHES. So it is your view that that was a proper decision by the Court and that the courts can handle what is becoming with increased rapidity a design to use fair use as a way to repress evidence?

Mr. PATRY. Yes. Judge Oakes last year also commented upon the unpublished nature, as did Mr. Turow here. The second factor is the nature of the copyrighted work, and it doesn't say published or unpublished. There are lots of different types of unpublished works: factual works, fictional works, works intended to be sent to government officials, whatever. The courts have, and perhaps need to a little bit more, to make distinctions about that nature and whether it is something that is highly expressive, like the Salinger letters, versus a letter that is sent to a government official. They can and do regularly make those distinctions.

Mr. HUGHES. Thank you. I have some other questions, but I am going to recognize the gentleman——

Mr. FRANK. Could I just before, if the gentleman will yield——

Mr. HUGHES. The gentleman from Massachusetts.

Mr. FRANK. I would just say—you said the Salinger letter as opposed to those that go to government officials. I have gotten some highly expressive letters, I must say——

[Laughter.]

Mr. FRANK. I just want to apologize, Mr. Chairman. The appropriation bill for the Housing and Urban Development Department is on the floor right now. That is a subject of great interest to me. I am going to have to leave. But I did want to say, because I evinced some interest at the last hearing and raised some questions, I do intend to read all this. And I just want to apologize to people for that, but I do have to be on the floor.

Mr. HUGHES. We thank the gentleman. There are a number of times the question of protecting the right to privacy has come up. I know that is of concern to the gentleman from Massachusetts.

The gentleman from California.

Mr. MOORHEAD. Mr. Oman, I want to join our chairman in welcoming you here today. We always appreciate you coming over and giving us your wisdom.

As you noted in your statement last week, I raised the issue of retroactivity with the various witnesses. I would be interested in your thoughts with regard to the issue of retroactivity in the current proposal.

Mr. OMAN. The issue of retroactivity would be raised only if you were determined to be making a change in the law here. And the stated purpose is not to change the law but to clarify the law, so I don't think that retroactivity is a factor under those circumstances.

If, in fact, it were determined that you were somehow changing the law, that could constitute a taking under the Constitution without benefit of due process or fair compensation, and that would raise some constitutional problems. Your bill, to avoid that, would have to be prospective only. In other words, it would have to cover only that material that was created subsequent to the passage of that legislation.

But, as I say, the bill merely reaffirms existing law, so there is no problem. And I hope that that will be the case.

Mr. MOORHEAD. Do you think this bill does anything? Do you think it changes the law? You know, many times in legislation we will say that a duck is not a duck but, as we found out yesterday, that it oftentimes is.

Mr. OMAN. I suppose it would require us to see how the courts finally interpret it to make any definitive judgments. Your statements in the record, your statements in your introduction, your statements in the legislative history that you intend no change in the law I am sure will have an important bearing on the interpretation of that law by the courts.

Mr. MOORHEAD. One of the areas where I think the current problem is most acute is with regard to magazine publishers. In the Magazine Publishers Association testimony last week, Ken Vittor described how magazines are more at peril because this issue is a time bomb that could explode for magazines any particular week. Moreover, weekly news magazine publishers don't have time to go to court to seek a declaratory judgment as to whether they can publish or not. This would take weeks.

Wouldn't you concede that there is some merit to the contention that it is impractical and unworkable prior to deadlines for a magazine publisher to seek litigation solutions to a similar problem?

Mr. OMAN. I recognize that that is a problem. It is certainly a problem that we were sympathetic to in consideration of U.S. adherence to the Berne Convention and where they felt that the moral rights of photographers, the moral rights of authors would trigger extended discussions about whether a photograph could be cropped or a story could be edited, and people who are putting out a weekly magazine just can't cope with that.

I do think that the courts are sensitive to these concerns, and I do think that the magazine publishers have been able to cope with this uncertainty for the past few years, at least since the 1976 act kicked in in 1978, and that they will continue to do so in the future.

Perhaps what they are complaining about is the fact that they can't walk quite as close to the precipice as they would like to, that they have got to draw back farther to avoid inadvertently stepping over the edge. This is a difficult question and I recognize that.

Let me ask Mr. Patry to further comment on that point.

Mr. PATRY. The problem, of course, is one of injunctive relief and you find the problem in the libel laws as well. This bill will not change the rules on injunctions at all. It will not give magazine publishers the ability to say in any particular case whether or not how much they took is going to be fair use. They will still face the same problems they did before.

One of the dilemmas in this case, this issue, of course, was Judge Newman's infelicitous language in *Salinger* saying that if you take more than minimal amounts of expression you deserve to be enjoined. In the *New Era* panel opinion he retracted that. He said, what I really meant to say is that you deserve to be considered an infringer and that the issue of remedy is a separate one. Chief Judge Oakes recently wrote an entire article on this called Copyright and Copy Remedies, in which he addressed the *Salinger* and *New Era* opinions and discussed whether or not an injunction should be issued.

But, in any case involving preliminary relief you still have to prove the likelihood of prevailing on the merits. And, if fair use is interposed as a defense, the courts will have to look at that.

Mr. MOORHEAD. Are injunctions usually automatic in these cases?

Mr. PATRY. They are never automatic because the courts have discretion. But, nevertheless, I believe that injunctions in copyright cases have been issued far more easily than they have been in other areas of the law. Some courts find that if you prove the likelihood of prevailing on the merits that you have also established a likelihood of irreparable harm, which is an element, of course, of any injunction.

But yes, the standard seems to be much lower for copyright cases than for other ones.

Mr. MOORHEAD. So their concerns are certainly legitimate. Later this morning or perhaps early this afternoon, we will hear testimony from a representative of the International Association of Broadcast Monitors. They are advocating for an amendment to the preamble of section 107 to include news reporting monitoring among a list of purposes for which a use is granted. I wonder if you have had an opportunity to study this issue. And, if so, what is your reaction to it?

Mr. OMAN. We have studied the issue in a very general way, Mr. Moorhead. We have not, of course, had the opportunity to study any legislative proposals on the subject. We did note, in several of informal studies, that the copyright law of 1976 and the courts generally view commercial activities differently than they view nonprofit activities. In the 1976 act there was a specific exemption for certain library activities that would allow the copying of news broadcast for archival purposes. I think one of the exemptions favored Vanderbilt University in Tennessee.

The fact that newspaper clipping services engage in a similar activity is certainly precedent for a type of video clipping service, and I think that that would be a factor that you would want to consider. I note the difference, however, that in the newspaper activity they actually buy a copy of the newspaper and physically cut up that newspaper. That is, I think, considered fair use. With the video clipping services, they would take excerpts from the evening news and provide those to their subscribers. And, though there are important elements of fair use here, it is a commercial copying, and the courts and Congress have traditionally treated those differently than copying for educational purposes.

Mr. MOORHEAD. Thank you very much.

Mr. HUGHES. I just have a couple more questions, Mr. Oman.

You obviously don't find in the second circuit decisions the same degree of hostility to fair use of unpublished works as does the publishing industry witnesses who testified before us last week. In this context, you point out that the second circuit heard oral arguments 2 weeks ago in the *Richard Wright* case, and you suggest that an authoritative statement of fair use of unpublished works might be made in that particular case.

My question is should we await that decision before moving ahead with legislation? And when do you anticipate a decision, if you know?

Mr. OMAN. I would not urge you to await that decision. It could be inconclusive. It could be not terribly instructive. It would be just one more factor you would consider, and I suspect that whether you decide specifically to await that decision or not the decision will come down before you make your final decisions in this case. Again, we are dealing with one circuit here. It is an important circuit in this area but still it is just one circuit's opinion, and it is your judgment as to whether or not this requires a legislative fix at this particular instant.

Mr. HUGHES. I know you have directed your oral comments to title I, but I have a question on copyright renewal, and I would like to ask it at this time for the record since, as you know, we will be taking that issue up in the coming days.

You observe that approximately 20 percent of works are renewed. Do you know why so few works are renewed and so many works are not renewed? According to your statistics, only 5 percent of photographs registered in 1962 were renewed, 0 percent of technical drawings. How does it promote the progress of science and the useful arts to automatically renew and give 57 more years of protection to works that the authors themselves in many instances do not care about renewing?

Mr. OMAN. I suppose the answer is they are of no commercial value at that point so what difference does it make whether they are automatically renewed. Who is going to be using them? Why would it promote the progress of science and the useful arts to have them fall into the public domain? They are worthless. They are not going to be used.

In the case of photographs, most of the photographs that are submitted for registration are the works of professional photographers who take your children's picture and they want to get copyright protection so you don't take that picture down the street to some copy shop and have copies run off much cheaper than the original photographer would. But those pictures have a value only at that particular moment in history. They won't have a value 28 years down the road in most cases.

Mr. HUGHES. I understand.

Mr. OMAN. So I think the short answer is that it really doesn't make a difference.

Mr. HUGHES. It doesn't do any damage.

Mr. OMAN. No.

Mr. HUGHES. That is the bottom line.

Do current renewal provisions in copyright law conflict with the provisions of the Berne Convention?

Mr. OMAN. We have a long history on this subject too, Mr. Chairman. During the discussion on Berne implementation this issue was studied at great length and the ad hoc committee that was organized by the Department of State concluded that, in fact, the renewal provision did violate the prohibition against formalities under the Berne Convention. However, the judgment was made by Congress that it was a transitory phenomenon, that by the year 2005 it would expire, and that to try to correct it legislatively prior to joining the Berne Convention would disrupt so many existing contracts that it really wasn't worth the effort.

And we explained that to the World Intellectual Property Organization in Geneva, the organization that administers the Berne Convention. They too said that it was no problem, not a bar to U.S. adherence to the Berne Convention. It was clearly being phased out and that that was fine from their point of view.

Mr. HUGHES. Can we solve the problem by automatically renewing foreign works only?

Mr. OMAN. Yes we could solve the problem. That would solve the technical Berne problem. But I wonder if we do want to create a different set of standards——

Mr. HUGHES. Whether as a matter of policy that is good policy?

Mr. OMAN. I would question whether that would be good public policy.

Mr. HUGHES. Thank you. Does the gentleman from California have any questions? If not, Mr. Oman, thank you very much. As always, you have been very helpful to us. We do have some additional questions which I did not get to, and we are going to keep the record open for 10 days and we would appreciate you responding to questions.

Mr. OMAN. Thank you very much, Mr. Chairman.

Mr. HUGHES. Now I call forward a panel of four very distinguished witnesses with diverse perspectives.

First, we will hear from Mr. Edward J. Black, vice president and general counsel of the Computer & Communications Industry Association. The CCIA is a trade association comprised of manufacturers and providers of computer information processing and communications-related services and products. CCIA's member companies generate revenues well in excess of $165 billion.

Second, we will receive testimony from Mr. August W. Steinhilber, chairman of the Educators' ad hoc committee on Copyright Law. Mr. Steinhilber is general counsel and associate executive director of the National School Boards Association. The ad hoc committee consists of nonprofit organizations representing elementary and secondary schools, colleges and universities, and libraries.

Third, the subcommittee will hear from Prof. Shira Perlmutter, Columbus School of Law, the Catholic University of America. Prior to embarking upon her teaching career Professor Perlmutter practiced law in New York City and represented clients in the copyright area. She is the author of several important articles on copyright law.

Last, and certainly not least, we will hear from Mr. Robert C. Waggoner, chairman of the Video Monitoring Services of America, Inc. Mr. Waggoner is also president of Burroughs Information Services in Livingston, NJ, and president of the New Jersey Symphony Orchestra.

I will recognize the witnesses in the order of their introduction. We welcome you here today. We have your statements, which we have read, and which, without objection, will be made a part of the record, and we would like you not to summarize—we would like you to summarize——

[Laughter.]

Mr. HUGHES. We would like you to summarize and not read the statements so we can get right to the questions.

First, Mr. Black. Welcome.

STATEMENT OF EDWARD J. BLACK, VICE PRESIDENT AND GENERAL COUNSEL, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Mr. BLACK. Good morning, Mr. Chairman, and Mr. Moorhead. It is a pleasure to be here today on behalf of CCIA.

As you have indicated, our trade association is comprised of manufacturers and providers of computer information processing and communications-related products and services. On the average, CCIA members spend approximately 10 percent or more of their total revenue on research and development.

In addition to my statement, I would like to ask, if I could, that an attached paper on the subject of reverse engineering also be placed in the record.

Last year, CCIA listened with great interest to all of the facts presented by the publishers and authors as to why they were seeking congressional clarification of section 107 of the Copyright Act as it relates to unpublished works. Although CCIA understands the publishers and authors' desire for legislative relief, we believe that their concerns are already addressed by the Supreme Court's 1985 decision in *Harper* v. *Row,* which stated that the unpublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use.

CCIA interprets title I as simply confirming the Supreme Court's decision. We are therefore supportive of title I because we believe that our industry's interests are not affected by this legislation as currently drafted since the legislation does not impact on the unpublished nature of source code or the object code that is distributed to users which in copyright terminology is a published work. Thus, CCIA does not believe that the legislation which the chairman has proposed has any impact on the application of the fair use calculus to the published object code.

So why are we here today? In part because of some mischaracterizations of common industry practices which have previously been made, as well as to try to bring before the committee some of our views on the complex questions surrounding the scope of protection of computer software.

As the chairman is well aware, the nature of technology in the computer industry and the manner in which computer programs are protected is unique. Computer programs can be protected by trade secret law, copyright law and, in the case of certain types of software related inventions, patent law. Until the special considerations relating to computer software arose, copyright and trade secret law coexisted in relative harmony. Computer programs are different from other copyrighted works, not only in their essential functionality, but also in the way in which the product is delivered to the customer.

Computer programs are first written in source code, higher level language understandable to human beings. However, source code is regarded as a trade secret and vendors do not provide documentation that completely discloses elements such as rules, processes or methods that are not protected by copyright. In our industry computer software is usually made available in the compiled machine version that consists of 0's and 1's. This is generally referred to as object code. This code is executable by the computer and it is generally incomprehensible even to experienced programmers.

Object code is not like other traditional works since the underlying principles and ideas in the copyrighted product cannot be analyzed without using various reverse engineering processes. Reverse engineering is an established industry practice commonly used by engineers and scientists in many fields. Previous witnesses before this subcommittee have suggested that one of the tools of reverse engineering, decompilation, is illegal or improper under U.S. copyright law. We believe this is incorrect. The Congress has not spoken on this issue, nor has case law supported such an assertion.

We believe that it is in the self-interest of some members of industry to cast doubt on the legitimacy of reverse engineering so that they may claim U.S. copyright law prevents the legitimate study and analysis of the underlying ideas, principles, functions and procedures of the copyrighted work, which is not the case.

Mr. Chairman, I have noticed from reviewing the testimony of other witnesses that there appears to be an effort underway to convert copyright into a "super trade secrecy law." Let me explain what I mean. Patent and trade secret law protect methods and processes, subject matter not covered by copyright law. They both also contain built-in and well thought out safety valves to promote competition.

Compared with copyright, patents have a relatively short life. More importantly, patent law requires an applicant to make an enabling disclosure of their invention and to indicate the best mode for carrying out this invention. In contrast, the trade secret can be maintained indefinitely and no disclosure is required. However, competitors are free to reverse engineer a product to discover the underlying methods and processes, the trade secrets. In fact, one of the reasons why trade secret law is able to coexist with patent law is that reverse engineering limits the impact of trade secret law, thereby encouraging innovators to meet the rigorous standards of patentability.

If copyright law is interpreted to prevent reverse engineering of unreadable object code, then the ideas underlying the code will be undiscoverable. Thus, the ideas would be protected by a "super trade secret law" broader than patent laws or State trade secret laws.

Mr. Chairman, members of the committee, we have seen over the last 20 years the U.S. computer and communications industry grow and prosper because many new and innovative companies have been able to enter the market built on the ideas of those already in the market by creating innovative products which are better and are less expensive than those previously available to the consumer. It is CCIA's view that the movement toward open systems and distributed network computing has brought tremendous benefits to the user community and to the Nation's economy overall, including the Federal Government.

Open systems provides a plethora of quality choices from competing vendors instead of leaving the consumer locked into the one system architecture sold by some proprietary vendor. We should be aware of those who might try to use the legal system to thwart the movement toward open systems.

Thank you.

Mr. MOORHEAD [presiding]. Thank you for your testimony. We will have our question and answer period after all of the witnesses have had an opportunity to testify.

[The prepared statement of Mr. Black follows:]

PREPARED STATEMENT OF EDWARD J. BLACK, VICE PRESIDENT AND GENERAL COUNSEL, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Good Morning. Mr. Chairman, the Computer & Communications Industry Association (CCIA) is pleased to testify before the Subcommittee in support of Title I of H.R. 2372 as presently drafted. CCIA is a trade association comprised of manufacturers and providers of computer, information processing and communications-related products and services. Ranging from young entrepreneurial firms to many of the largest in the industry, CCIA's member companies collectively generate annual industry-derived revenues in excess of $165 billion and employ over a million people. On average, CCIA's members spend over 10% or more of their total revenue on research and development.

As the Chairman and the Members of the Subcommittee are aware, H.R. 2372 amends Section 107 of the Title 17 of the Copyright Act, which codifies the judicially-created fair use doctrine, shielding from copyright infringement liability certain uses of a copyrighted work that might otherwise be infringing. Since CCIA's member companies protect their software products as literary works under the copyright law, we are concerned that any new interpretation of U.S. law will affect how our companies protect their current products, conduct their business and develop innovative products in the future.

As a result, CCIA has taken a special interest in the public policy debate surrounding proposed changes to Section 107 designed to address the decisions of the Second Circuit Court of Appeals in *New Era Publications, International v. Henry Holt & Co.* and *Salinger v. Random House* which some have interpreted as imposing a virtual *per se* rule under which *no* fair use would be permitted for unpublished works. At last year's hearing, CCIA listened with great interest to all of the facts that were presented by the publishers and authors as to why they were seeking Congressional clarification of Section 107 as it relates to unpublished works.

Although CCIA understands the publishers' and authors' desire for legislative relief, CCIA believes that their concerns are already addressed by the Supreme Court's 1985 decision in Harper & Row v. The Nation, which dealt with the question of the fair use of unpublished copyrighted materials. According to the Supreme Court, "the unpublished nature of a work is [a] key, though not necessarily determinative, factor tending to negate a defense of fair use."

Thus, CCIA interprets Title I of H.R. 2372 as simply confirming the Supreme Court's decision. We do not believe that, as presently drafted, the legislation affects our industry's interests directly. If this is true, why have members of our industry come before you to discuss this bill and its potential impact on our industry? The answer is a complex one which I will seek to explain in my testimony.

The nature of our technologies and the manner in which computer programs are protected is unique. Computer programs can be protected by trade secret law, copyright law and, in the case of certain types of software-related inventions, patent law. Patent law requires an applicant to make an enabling disclosure of its invention and to indicate the best mode for carrying out the invention. Trade secret law allows competitors to discover by "reverse engineering" the secreted elements of the marketed product. Reverse engineering has been defined by the Supreme Court in Kewanee Oil v. Bicron "as a fair and honest means of ... starting with the known product and working backward to divine the process which aided in its development or manufacture." The Copyright Act, on the other hand, does not expressly require disclosure or enable discovery of a copyrighted work's secreted elements, mainly because copyrighted works rarely contain elements that are secreted.

Until the special considerations relating to computer software arose, copyright and trade secret law coexisted in relative harmony. But computer programs are different from other copyrighted works, not only in their essential functionality, but also in the way by which the product is delivered to the customer. Computer programs are first written in source code (a higher level language like "Basic," "Cobol" or "C"). Source code is easily read and understood by any knowledgeable computer programmer, and it contains the notes of the programmer on how the program works and what it does. However, source code is guarded as a trade secret and vendors often do not provide documentation that completely discloses elements such as rules, processes or methods, that are not protected by copyright. In our industry, computer software is usually made available only in a compiled machine version that consists of 0s and 1s. This is generally referred to as object code. Object code is executable by the computer and is generally incomprehensible even to experienced programmers.

Mr. Chairman and Members of the Subcommittee, it is very important to note that the object code that is distributed to the users is, in copyright terminology, a published work. Consequently, as I stated earlier, CCIA does not believe that the legislation which the Chairman has proposed has any

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impact on the application of the fair use calculus to object code. Since neither the Salinger nor the New Era cases addresses fair use issues unique to the software industry, we do not believe that this legislation is intended to address our industry and we hope that the legislation and any legislative history will faithfully reflect this point.

Certain members of our industry have come before this Subcommittee and suggested that reverse engineering practices such as decompilation encourage piracy and discourage innovation. We believe that these assertions are gross mischaracterizations. More importantly, however, is the fact that these issues have nothing to do with this legislation since it is the published object code which is reverse engineered. But, we would like to clarify the record with regard to these important issues, if we may.

Some have also suggested that U.S. copyright law forbids one form of reverse engineering commonly referred to as decompilation. It is CCIA's understanding that neither the courts nor the Congress have expressed any definite views on the desirability or legality of this practice. Certain members of our industry appear to be using public forums to foster the mistaken belief that these common practices have been found to be illegal and/or immoral.

There are many complex and legitimate reasons why reverse engineering is used in our industry. As I stated previously, object code is generally incomprehensible to people. Object code is not like other traditional literary works, since the underlying principles and ideas in the copyrighted software product cannot be easily examined without using various reverse engineering processes. Examination of computer programs is done to correct errors in the program, to perform maintenance operations, and to ensure that different computer products can interoperate in today's global distributed computer networks. Over the last twenty years, the U.S. computer and communications industry has grown and prospered because many new and innovative companies have been able to enter the market and build on the ideas of those already in the market place by independently creating innovative products which are better and/or less expensive than those previously available to the consumer. It is CCIA's view that the movement toward "open systems" and distributed network computing has brought tremendous benefits to the user community, including the Federal Government. Open systems provide a plethora of quality choices from competing vendors instead of leaving consumers locked-in to the one system architecture sold by a proprietary vendor.

Reverse engineering is an established industry practice commonly used by scientists and engineers around the world, and it is an integral part of how our companies do business. Reverse engineering is often necessary in a technological environment where markets change in a manner of months (long before detailed technical specifications are published, if they are ever available.)

Since reverse engineering is a very complicated issue and is the subject of so many inaccurate statements, CCIA thought that the attached overview of reverse engineering techniques and their application in our industry would be helpful to clarify certain aspects of the debate on reverse engineering. The paper's author, Andy Johnson-Laird, President, Johnson-Laird, Inc., has graciously allowed us to reproduce it for the Subcommittee.

Mr. Chairman, I have also noticed in reviewing the testimony of other witnesses that there appears to be an effort underway in this and other forums to covert copyright into a "super-trade secrecy law." Allow me to explain what I mean by this term. Patent and trade secret law protect methods and processes (subject matter not covered by the copyright law), they both also contain built-in and well thought-out safety valves to promote competition. Compared with copyright, patents have a relatively short life; also, others are free to try to design around the well-defined and understandable patent claims. And, most importantly, patent law requires an applicant to make an enabling disclosure of their invention. In contrast, a trade secret can be maintained indefinitely and no disclosure is required. However, a competitor is free to reverse engineer a product to discover the underlying methods and processes -- the trade secrets. In fact, one of the reasons why trade secret law is able to coexist with patent law is that reverse engineering limits the impact of trade secret law, thereby encouraging innovators to meet the rigorous standards of patentability established by Congress. If copyright law is interpreted to prevent reverse engineering of unreadable object code then the ideas underlying the code will be undiscoverable. These ideas will be protected by a "super-trade secret law" broader than the patent laws, or state trade secret laws.

We should be very careful before we allow ourselves to go down a road where copyright protects not just the original expression, but also the underlying ideas and principles. CCIA does not believe that U.S. copyright law should be construed in a manner which prevents the legitimate study and analysis of the underlying ideas, principles, functions and procedures of a copyrighted work. If copyright law prohibits making a transitory copy for this limited purpose, the program's functional specifications --- its unprotectable ideas --- would remain secret, preventing the creation of new, innovative, non-infringing computer products which are independently developed. Such a policy would discourage innovation, defeat the movement toward "open systems", reduce consumer choice, and ultimately diminish the diversity, creativity, and competitiveness of our industry.

In conclusion, Mr. Chairman, CCIA clearly understands that well-intentioned people may disagree strongly on what legal environment is best for the technological future of our industry, and for the public welfare. However, it is not beneficial to a proper public policy debate for certain members of the industry to make overly broad, unfounded accusations and derogatory statements about the views and practices of other members of the U.S. computer industry. Moreover, we do not believe that this legislation addresses or impacts upon the legal, technological and economic issues surrounding reverse engineering procedures in our industry. Thus, assuming the Subcommittee understands and agrees with our interpretation of the scope of this legislation, we are pleased to support it.

Thank you very much for providing me this opportunity to testify and I would be delighted to answer any questions.

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Reverse Engineering: Separating Legal Mythology from Actual Technology

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Introduction

More and more recent court decisions are being made in cases involving reverse engineering of software. The European Community (EC) is working on a new Software Directive that may outlaw reverse engineering. But not everyone is clear on what reverse engineering is (and what it is not), who does it, when they do it, how they do it and why they do it. This ignorance has the potential to reduce the US's ability to compete in the world software market by creating an unrealistic framework within which it must operate. Already US judges and EC bureaucrats have made decisions and directives that threaten to make reverse engineering a synonym for software theft. There is a considerable risk these lawmakers will attempt to outlaw a process that is absolutely fundamental and vital to the process of software development.

It is easier to gain a practical knowledge of software reverse engineering in three stages: firstly, to see reverse engineering in real-world, non-computer related contexts; secondly, to see the process of software engineering, and finally, to see reverse engineering in the context of software.

What is "Reverse Engineering"?

One legal definition of reverse engineering is "the process by which a completed product is systematically broken down to its component parts to discover the properties of the product with the goal of gaining expertise to reproduce the product." This definition does not do justice to the process of reverse engineering of software. It lacks understanding of the special nature of computer software and thereby draws a veil over the realities and permits legal myths to spring up.

Fortunately there are many real-world examples of reverse engineering that require no knowledge of computer science. The examples that follow are complete — they track closely to the process and the problems of reverse engineering at several levels, ranging from the most visible to the more subtle.

Mmmmm. This tastes good. What's in it?

Imagine that you are dining in one of the best restaurants in town. You have just taken your first bite of a delicious entree. It is so good that you ask the Chef for the recipe, but get nothing other than a Gallic shrug (it's a French restaurant) and a mumbled apology from which you discern that it is a family secret.

Now what?

You start to analyze what your taste buds, olfactory senses and eyes tell you: you can taste something like oranges, and then there is a flavor of basil, or is it thyme? There is also a hint of nutmeg in the sauce. But what is that delicious rich flavor?

Assuming you are a diligent gourmet you will probably be able to identify most of the major components of the dish — but what of the actual process of creation, the cooking? Just knowing the ingredients is only part of the story, you also must find out how the ingredients are combined, both in terms of their relative proportions and the cooking process. Were the onions browned in butter? Was orange peel used? Only when you had made educated guesses as to the ingredients could you attempt, using your own culinary knowledge and skills, to recreate the original dish. Even then, it would probably take several attempts. You may need to go back to the restaurant to refresh your memory by ordering the same dish.

It hurts here, Doc.

Now consider the case of a General Practitioner confronted by a patient with a problem. The doctor determines what is wrong by interrogating and examining the patient: Where is the pain? What kind of pain is it? When did it start? Have you had a history of this kind of pain? And so on. Once sufficient data has been gathered from the patient, the doctor uses his skill and training to formulate a diagnosis and prescribe an appropriate course of treatment.

Doctors would be the first to admit that in many cases their initial diagnosis and treatment are wrong. Patients return having taken their medicine but without relief. The doctor must then refine his mental model of the problem, integrating new information, modifying his diagnosis and trying again.

There's this funny clonking.

Remember the last time you took your car to the garage because of a strange noise emanating from the front of the car? The service reception clerk would, in all probability, have worked through a list of questions rather like the doctor's: What kind of noise is it? Does it happen all the time? When did it first start?

The clerk and his mechanic must use their knowledge of your particular car and general engineering principles to try and identify the source of the noise and select the appropriate repairs.

How many times have you driven away from the garage with your car and without your money, only to discover that the problem is still there; the same old clonking noise happens just as before, exactly as you had described to the garage staff? All you can do is take the car back and permit the mechanic to have another try at building a correct mental model.

Lessons from these Examples

These are but three fairly simple real-world examples, but they are all complete working models of reverse engineering. All three examples have the following characteristics:

1. Someone was confronted with the unknown or the unexpected.

2. In order to understand the problem, that person attempted to create a mental model. Such a model, in order to be any good, must be so complete that it could be used to *predict* the likely outcome of mixing particular ingredients or consuming certain tablets or tightening certain nuts and bolts.

3. The real-world information available about the food, the medical problem and the automobile problem was incomplete and approximate. The mental model required to understand the problem, and thereby derive the solution, is therefore incomplete and probably could not be used for accurate prediction of the outcome—at least not on the first try.

4. In an attempt to augment the real-world data available, the individual in each example must use their own training, prior knowledge and skill to fill in the gaps and create a working hypothesis that forms the basis of their mental model.

5. The model will be judged good enough only if it predicts outcomes correctly—the recipe would only be good if the result tasted the same as the original, the diagnosis and treatment would only be good if the patient was cured, and the car repairs would only be good if the funny clonking noise disappeared.

Remember these three examples—their characteristics will be analyzed in more detail in a moment.

What is Software Development?

Software development, sometimes called software engineering, is a process of metamorphosis, but, unlike the caterpillar to butterfly transformation, has many more stages. At each stage, conceptual information is stripped off like the discarded outer skin of the caterpillar.

Specifically, the stages are:

1. The original idea, existing as a mental model within the cortex of the software's creator.

2. A product overview document, recording in outline the mental model, the "vision" of the product. The nuances of pure thought are locked onto paper. Much of the fluidity, the spontaneity and the details of the original model are lost because of the constraining effect of the written word (and perhaps computer people's distaste for writing these kinds of documents).

3. A formal specification of the program, intended to share as much of the original vision as possible between the several members of the team who are about to implement the program. This document also strips off some of the higher conceptual levels present in the designer's head as it adds more implementation-specific details.

4. A design for the program, similar in nature to an architect's sketch, showing the major parts of the program, the external views of the program, the internal modules and the way that information will flow between and be processed by these modules. By now, the focus is on *how* to implement the program and therefore higher level conceptual information will be omitted.

5. The human readable form of the "source code", produced by translating the logical steps and processes required to move and manipulate data within the program. This source code is written in a stilted but coldly efficient artificial language such as COBOL, FORTRAN, BASIC and C. All such languages permit programmers to write the required program logic in a precise, unambiguous way, as well as embedding their notes to themselves alongside each line of computer code. The part of the source code used to control the computer describes in a completely precise manner *what* the computer must do and the sequence in which it must done. The programmer's notes describe the higher level concepts of *why* the computer is being directed to perform a particular operation—perhaps the final method chosen is less than obvious, or perhaps it is chosen with an eye to some future enhancement. Regardless of the diligence of the programmer, huge amounts of higher level information in the specification are sloughed off and are not contained within the source code.

6. The computer executable form of the program is translated (more correctly, "compiled") from the source code by a special program (the "compiler") already available on the computer. This program both translates the computer part of the source code into the computer instructions required to move and manipulate data, and also optimizes the sequence of these instructions to make best use of the way the electronics within the computer work. Furthermore, to avoid programmers having to write source code for commonly required tasks, the compiler links libraries of previously compiled modules with the computer instructions derived from the source code to form the "executable" program—a program capable of being run on the computer.

The executable program, the butterfly of the piece, is remarkably different from the respective caterpillars from which it was created: it lacks any easily readable content, consisting only of seemingly random numbers; it lacks all of the programmer's notes explaining the whys and wherefores, the higher level concepts and motives explained in the source code; the original sequence of the source code has been scrambled as a result of optimizing the computer instructions for most efficient execution; finally, several thousand additional computer instruction have been added from prefabricated libraries to do routine housekeeping tasks.

Before any computer program, regardless of size or complexity, can be licensed commercially to end-users, it must be documented and tested. The documentation includes such manuals as the user guide with a tutorial to teach people how to use the program, reference manuals to explain every feature of the program, envelopes and labels for floppy diskettes, license agreements and even postage paid registration cards to be returned to the vendor with the end-user's name and address.

The testing of a computer program is, quite literally, an impossible task. Modern software is typically several hundreds of thousands, sometimes millions, of computer instructions, all of which have to do the right things in the right order at the right time for the program to operate correctly under all possible conditions. There is an old saw in the computer industry that testing reveals the presence of mistakes—not their absence. Errors creep in at all stages; perhaps the product specification or the design specification described some feature that reads well on paper but is impossible to implement in software. Perhaps the source code contains a logic error—a disparity between the specification and the implementation. There are literally millions upon millions of possible interactions and different conditions under which the program must operate correctly, and yet there is not enough time to test for all these conditions. This is not just from the need to get the product to market—there is not enough elapsed time available in the average human lifespan to test for all possible combinations.

Software developers must commit a huge amount of effort to testing complex software and even the largest vendors such as IBM, Apple and Microsoft have shown the rest of the world that it is not unusual to be *years* late with large complex programs. The cost of correcting a mistake in a program increases exponentially the longer it takes to find the mistake; fix it before the program is distributed and it may cost from $10 to $1,000 in direct and indirect costs; fix it after distribution has occurred (when there are thousands of copies in the world), and the costs can be in the hundreds of thousands of dollars. Fail to fix enough of the mistakes and the company may not survive.

The computer industry has already encountered the sobering experience that testing programs and updating them to remain competitive will, over a typical program's life, cost ten to twenty times more than the original program's development. If a typical program costs $300,000 develop (and that figure is probably low for market leading software), ongoing maintenance, enhancements and testing will cost $3,000,000 to $6,000,000 over a product life of perhaps five to six years.

Completing the real-world context

In today's computers, from microcomputer to mainframe, a single program must operate in the company of many other software components in what is essentially a software commune. Anti-social behavior by any one component may result in lost data, garbage appearing on computer screens, or a "system crash" (where the computer system goes wild and must be reset). Therefore, a significant part of testing a new software product involves testing its ability to co-exist with the other software. This inter-operation with many, many other software modules demands that standards be defined to permit one program to communicate with another—the programs must agree on which side of the road they will drive.

These standards take two forms: interfaces and protocols. Unlike other jargon words in the computer field, these two are used in almost exactly their normal meaning.

An interface is a software connection between two modules. Think of this as a 1040EZ tax form—this is one of your interfaces to the IRS. It only works as an interface because you agree to put certain data in certain places on the form. The IRS can then process your data correctly and, if appropriate, respond to your form by sending you a refund check. So it is with software; an interface is nothing more than a "pro forma" method of interconnecting two different computer programs. The interface designer creates a documented method of handing information from one module to another, and another for returning responses. An interface has two characteristics: data structure (the layout of the form) and data content (the numbers that you write). For accurate communication, both structure and content must be correct.

A protocol is simply an interface with a time element involved. For example, we use an unwritten protocol on the telephone: only one person is to talk at any time; if both people start talking, one (or both) fall silent. If the silence is too long, one (or both) may attempt to re-establish communications by saying "Hello?" The interface is the telephone line, the connection between the two people. The protocol involves timing. Anyone who has ever used a radiotelephone (where only one person can transmit at a time and must say "Over" to tell the other party to go ahead) or a transatlantic phone call via satellite (where there is a one second delay), can attest to the problems that time delays cause to normal telephone protocol. What often happens is that both people start speaking at the same time, both realize the problem, both back off, both say "Go ahead" and both start speaking at the same time all over again. This is an example of a failing protocol—easily fixable merely by what is said and when.

Computers in the real world have many different types of interfaces: some connect one piece of software with another as described above; yet others exist between pieces of software and pieces of hardware, others exist between one piece of hardware and another piece of hardware, and finally, there are interfaces between hardware and humans. All of these conform to the definition that, as interfaces, they are points in an information processing system through which information passes essentially unchanged. This characteristic can also be applied in reverse: if a particular point in an information processing system changes the information passing through it, then it is not an interface.

Almost all of these other kinds of interfaces operate using protocols of differing purpose and complexity. However, they still conform to the basic definition that a protocol is an interface to which the element of time has been added.

Interoperability

For two different programs written by different programmers from different companies to work together, or in the vernacular of the Europeans drafting the new Software Directive, to "interoperate," all of the interfaces and protocols must be known to both programmers. Moreover, both programs must adhere to the letter of these interfaces and protocols. If they do not, it will be like putting erroneous information on your 1040EZ or two people on a radiotelephone link talking at once. The programs will fail to interoperate correctly and the results can be unpredictable.

Interoperability may also require one program to know the exact layout (structure and content, again) that another program uses when it writes information to a data file on magnetic media (such as a floppy or hard disk). Many a frustrated computer user has discovered that their favorite word processor cannot handle the data file format of their spreadsheet program and has been forced to re-type the same numbers.

In summary, for two programs to interoperate, both must have been written with accurate knowledge of the interfaces and protocols to be used. Any inaccuracy will cause a problem—computers are far less tolerant of minor errors than are humans; they demand absolute accuracy.

Competitive Products

Interoperability implies peaceful co-existence between two programs. But what of outright competition? What does it take to produce a new program that competes effectively with an existing program?

The first decision for the would-be developer of the competitive program, is whether to create a completely dissimilar program that competes for the same users or whether to produce a similar but "better" (more feature-rich, faster, smaller, cheaper) version of the program. In computer jargon, this latter case is referred to as a "clone" of the original program—a functional equivalent of the program but produced independently.

Developing a completely new program for the same target market is the most difficult and most expensive way to compete but for less than obvious reasons, the design and implementation of the software itself will cost more or less the same as a clone (for reasons that will be described later) but it will cost much more to advertise and market the product to convince the new users to use this "better mousetrap" and existing users to discard the "old" mousetrap.

As all of the major players in the computer industry have learned, it makes good business sense to develop either a complete or a partial "clone" product, a product that offers some degree of "compatibility" with an existing product. IBM's first personal computer had many features of the very successful Apple II. Digital Research developed an operating system (the software the controls all physical operation of the computer), CP/M, that had many of the features of Digital Equipment's TOPS-10 operating system. Microsoft developed MS-DOS (Microsoft Disk Operating System) which had many of the features of Digital Research's CP/M operating system. More recently Digital Research has developed DR-DOS which has many of the features of Microsoft's MS-DOS. In the application area (the programs that do the user's work), there is a similar history. The seed spreadsheet program was Visi-Calc, running on an Apple II. This was followed by numerous other spreadsheets such as SuperCalc, and Lotus 1-2-3, both of which had many of the features of Visi-Calc.

In summary, there is a continuous history of competition between companies who develop functionally similar programs, each hoping to offer the end-user more features and more performance for less cost.

Ingredients for a Clone Product

A clone product, to be commercially viable, must offer the same or better features as the original. The best assessment of quality for a clone product is whether or not it can be substituted for the original program and be capable of processing existing data files created by the original. This test must also be applied to "attaching" programs (sometimes called "add-on programs") that augment a product such as Lotus 1-2-3 by additional processing of Lotus' data files.

To meet this substitution test, the clone implementor must have detailed information about the interfaces and protocols used by the original program, the details of the structure and content of all of the data files and complete details of the behavior of the program as it performs its processing. Any insufficiencies, any differences, between the clone and the original program are equivalent to mistakes in the clone program and will count against it in the marketplace.

Given that a software vendor has the right to produce a competitive clone program or an "attaching" program—and the courts appear to be silent on this issue, even though all of the major players such as IBM, Apple, Ashton-Tate and WordPerfect have produced, if not clones, then products that are modelled very closely on others —the clone implementor needs to gather together a significant body of detailed information: the file structures and contents, the commands entered on the keyboard and the functionality they perform, the kinds of printouts produced and the exact behavior of many internal functions of the program. Even when a vendor wishes nothing more than interoperation, they must know the details of an original program's file format and content.

There are only four possible sources for this information: the technical documentation available on the commercial market in the original product manuals; information in technical magazines and books; experimentation with a legitimately acquired copy of the program, running it on a computer to observe what it does and the kinds of files it creates; and finally, information gathered by analyzing the inner workings of the original program. It is this process of analysis that has been dubbed "reverse engineering," and that was defined in a United States Supreme court ruling (Kewanee Oil Co. v. Bicron Corp. 416 US 470, 476 (1974)) as "... starting with the known product and working backward to divine the process which aided in its development or manufacture."

Software manuals and specifications are by definition, incomplete, inaccurate and out-of-date. They are normally written before the software is completed and are therefore a statement of intent rather than a description of fact. Even when they are written after the product has been completed, they never succeed in describing all aspects of the product, nor are they error free. The *only* valid source of accurate information about a program is the computer executable program itself. This can be the only arbiter of compatibility—if the clone computer program fails to work right because of some incompatibility or difference between it and the original program, it really does not matter what any manual says. If the program does not work, the program does not work.

What is "Software Reverse Engineering?"

"Software reverse engineering" is really a misnomer, a convenient "handle" ascribed to the process of analyzing existing software. The process is akin to an artist in an art gallery studying the paintings of great masters, or an author reading great literature. The artist analyzes the composition, the colors, the patterns of light and dark, the brush strokes and all discernable techniques of the great masters. The author analyzes the plot, the characters, their introduction, the phrases, the adjectival clauses and the feelings inspired by great literature. It is important to note, even though the process of software development and reverse analysis relate comfortably to the process of creating art and literature, the finished products, computer programs, are very different from artworks and books in many important ways— remove one word from "Moby Dick" and it is still brilliant literature, but remove one "word" (normally 16 binary digits of information) from a computer program and it will probably cease to function.

By the *process* of analysis, the author and the artist hope to better themselves, be inspired to create better paintings and prose. Although neither the author nor the artist intend to produce a forgery of painting or novel, the analysis they perform is almost identical to the analysis, the "reverse engineering," of software.

In the case of software, a skilled programmer will examine the computer executable version of the program containing the computer readable instructions. Although these look like tables of random numbers, a programmer can decipher them and create a list of human readable machine instructions. This is not the human readable source code written by the original programmers—far from it—instead it is a mere faint echo of the original source code. The actual instructions to the computer are at a much lower level of detail than those in the original source code and, of course, there are no human readable comments; the comments were removed during the metamorphosis into computer executable form.

Deciphering computer-executable programs is extremely tedious and error prone; it can take up to a minute or so for each computer instruction (a typical program might contain 500,000 instructions—347 days' worth of deciphering); so most programmers use another specialized form of program called a "disassembler" to create listings of the instructions and the numerical data on which they operate. Disasssemblers only mechanize the deciphering process. They cannot do more, as the computer-executable form of the program simply does not have any more information in it.

To glean further information from the disassembled program, a programmer must spend considerable time analyzing the instructions, trying to discern what their original intent and their actual effect might be.

Recall the earlier examples of the gourmet attempting to recreate a recipe, the doctor diagnosing a patient's illness, and a mechanic analyzing a car. This is exactly the same process as a programmer trying to analyze software.

In order to understand the computer program, the programmer must be able to create a complete and accurate mental model, accurate enough to predict the behavior of the program. Nothing less will do.

In the course of this analysis, the programmer will create numerous "straw horse" mental models, essentially educated guesses as to what might be going on within the program. Each of these will be tested against what is already known about the program, and will be extended either by additional evidence from the program, or by hunches that the programmer forms based on experience and knowledge. If evidence within the program tends to support one of these tentative mental models, that model moves closer to being accepted. Contrary evidence may mean the model must be discarded and a new hypothesis formed.

This kind of analysis results in tentative diagrams showing the logic used by the program. Any explanatory remarks on these diagrams, any annotations of intent or suggested explanations are entirely the work product of the programmer—the computer executable form of the program does not have this kind of information in it.

With sufficient analysis, patience and time, a programmer can work up from the low level form of computer executable code to a complete higher-level understanding of what the program does, the order in which it does it, and the structure and content of the incoming and outgoing information. All interfaces and protocols can also be discerned; final confirmation of protocols will probably require observing the program running on the computer (using special diagnostic tools as spyglasses) owing to the timing aspects of protocols.

Once the programmer has completed the analysis and prepared a detailed specification, the preparation of the clone program can start. This process is identical to the software engineering process described above: the specification is transformed into new, independently developed source code; this is metamorphosed into a computer executable form and tested on the computer. If any problems emerge during the testing phase, it may only be possible to resolve these by further analysis of the original program to complete the mental model of operation (this is akin to getting your car back from the garage with the problem still unrepaired and having to take it back to the garage after you have done more experimentation).

Software reverse engineering is largely a laboriously *additive* process, that is to say, programmers must supply a considerable amount of information from their own heads as there is no higher level information left in the computer executable program.

When is 'Reverse Engineering' necessary?

There is one simple rule for knowing when reverse engineering of software is necessary—just like the real world of the gourmet, the doctor or the mechanic—whenever the available information is incomplete.

If, for example, there is a problem in the design phase of a new program (perhaps a clone program, perhaps not), and the designer needs to know the exact details of an interface, a protocol or a data file structure, and the available documentation does not provide the answer, the only recourse is to reverse engineer.

If during the testing of a program a problem shows up, perhaps with the interoperation with other software, or perhaps an incompatibility between a clone program and the original, if the documentation does not provide an answer, only reverse engineering will.

The short answer, therefore, is that reverse engineering is a fundamental part of the normal software development process, regardless of the kind of software being developed and regardless of the stage of development.

It is also noteworthy that a programmer, in the process of doing reverse analysis, thinks nothing of analyzing the computer executable form of other companies' programs. There are no lines drawn between the program of one vendor and that of another; there are no visible frontiers or markers that say "Caution, you are now entering proprietary software written by Apple Computer." The programmer merely follows a trail of logic through the software maze as it twists back and forth until a complete mental model, and thereby understanding, is achieved. The maze of consists of dozens, if not hundreds, of different pieces of software, intermixed like a giant patchwork quilt. It is technically infeasible for a programmer in hot pursuit of a software bug in the maze to stop at the border of another vendor's program. Not only would it be difficult, if not impossible, to produce an accurate vendor map of the millions of computer instructions loaded into a modern computer at any given instant, but there would be many, many problems a programmer simply could not fix if he had to screech to a halt at the state line and watch impotently as the computer headed for the distant horizon in an adjacent vendor's software.

A full time professional programmer probably indulges in reverse engineering at least once a week as part and parcel of their normal job. It is not even a noteworthy activity, other than programmers as a race hate to do it because it is extremely difficult, boring, time consuming and far less creative than normal "forward engineering." However, when faced with incomplete information, it is the only known way of making progress.

Mythology Debunked

There has been much debate in the legal community over reverse engineering. In the USA the debate has been triggered by recent copyright litigation and decisions. In Europe, the trigger has been the new Software Directive being drafted by the European Parliament.

Sadly, one of the byproducts of this debate has been a large amount of what is best described in polite circles as mythology; mythology that needs to be debunked once and for all if we are to avoid damaging the software industry by permitting the creation of law that is out of contact with the real world. Each of the following sections describes the mythology, and, where possible, the apparent source, followed by real-world observations:

"...decompilation—what is being called reverse engineering, is the process of copying machine language software, then converting it into assembly language and finally into a higher level language such as Pascal or C." [Irv Rappaport, writing as Apple's Intellectual Property Counsel, in the San Francisco Recorder, February 22/26, 1990].

In computer science, "decompilation" cannot be done. The metamorphosis of human readable source code into computer executable programs strips off too much information for it to be reversed. An exact equivalent would be to attempt to make eggs from omelettes—it simply cannot be done.

When asked why a mythical process was given apparent legal status, one member of Directorate General III of the European Parliament explained to a prominent American intellectual property lawyer that the word "decompilation" was used because there was no word in the French language for "disassembly!" Thus a myth was born.

Reverse engineering, as described in this myth, implies that it is a routine conversion requiring little intellectual contribution from the programmer. Nothing could be further from the truth. It is extremely demanding of the skill and experience of the programmer.

"To learn about a program, one can study the published documentation, read the object code, observe inputs, outputs and conditions of operation, perform timing tests, observe screen displays, and, by attaching test equipment, physically examine the internal parts of the computer during execution of the program—all possible—and legal under existing copyright law—without engaging in decompilation." [Irv Rappaport, as above].

Interestingly, with the exception of the last four words of this excerpt, this is a pretty good practical description of reverse engineering. The myth is that "decompilation" is somehow an aberrant extension of the process.

While it is true that one can indeed study much of a program, its behavior as it runs on the computer and its documentation, to suggest that no "decompilation" is required is a myth. Modern programs are too complex to be tested completely even by their own authors, let alone tested and observed completely by those needing more information. The programs are also too complex to be documented totally in their manuals (which as mentioned before, are statements of intent not reality).

"Decompilation" is the only practical method for getting complete, accurate information about the program. The suggestion otherwise is akin to asserting that the only way to diagnose a problem with a car engine is to inspect it from the outside, listen to it run, and read the repair manual. True, doing these things will yield valuable information, but what if they fail to yield enough or the right type of information to fix the problem? Clearly, the only viable alternative is to take things apart—and the only practical way of doing this is using "decompilation."

"Nor is decompilation necessary to allow interoperability between different manufacturer' computer systems. Technical information is often published, not only to meet customer preferences for interoperability, but also to encourage the development of third party programs for use with the developer's product." [Irv Rappaport, as above].

Again, this myth that published documentation is complete and accurate. Even in those cases where companies deliberately publish detailed internal information—Apple Computer is a good example with their *Inside Macintosh* technical reference manuals—such documentation has many discrepancies; it simply fails to provide complete and accurate information about the software *as it really exists*.

Technical documentation, even the best in the world, can be nothing more than a description of the software, rather than the software itself. It is the software alone that forms the only complete and accurate description of what it does and how it does it. To deny a programmer access to this is the same as telling an artist that they may only read descriptions of the Mona Lisa instead of seeing the real thing.

"Any successful software product can be copied and decompiled with a flick of a console key, without significant investment or risk. Thus the decompiler can erase the lead time of the program developer and significantly reduce the originator's market for the authored work." [Irv Rappaport, as above].

This is not true. While it is relatively easy to use a disassembly program to transform a computer executable program back into human readable instructions, it is extremely difficult, time consuming and demanding of great skill to generate the higher levels of information about the program. A disassembled program, in and of itself, is worthless to a software developer unless they understand what the program does and how and why it does it. Without this understanding, which can only be won with an incredible amount of hard work, the resulting "new" program will be full of mistakes, undocumented and unmaintainable. The "new" program would not have a hope of being commercially viable. Therefore "decompilation" simply cannot decrease the cost of getting a competitive program to market—it takes more time to reverse engineer an entire program than to design a "clone" from scratch.

This quote also contains another implied myth, that programmers disassemble entire programs. This is not true for several reasons: firstly, the volume of data that this would create would be enormous, far more than would be useful, and secondly the computer readable form of the program has been scrambled when it was optimized and combined with prefabricated "housekeeping" modules. It is extremely difficult to isolate the main part of the program—there being thousands upon thousands of instructions present in the program for these mundane reasons, and they serve to obscure the heart of the program.

"In the industry the term [interface] has been used at various times to refer to a broad range of programming interactions, between, for example, (1) parts of a program, (2) hardware and software, (3) hardware and hardware, (4) operating systems and application programs, (5) computers and networks, and (6) computers and users. Computer programs do not have specific discrete points of connection, like electric sockets and plugs. Almost any part of a program can be an "interface" and interface programming is often a key qualitative difference between programs.

"Not only have the proponents [of the EC directive] not defined this term, but it is highly unlikely that it could be satisfactorily legally defined. By simply labelling a part of a program an "interface" a competitor could eviscerate protection for a computer program, one element at a time." [Irv Rappaport, as above].

Dealing with these myths slightly out of sequence: Computer programs do indeed have specific points of attachment—if they did not, it would be impossible to create a computer like the Apple Macintosh with application programs that use up to 760 different and precisely defined interfaces to the Macintosh operating system.

It is certainly true that the word interface is used in the contexts enumerated above. These are all examples of *a point in an information processing system through which data flows without any change*. This incidentally is a precise definition of an "interface"— if the information is being changed, then it is being processed. If it is not being changed, then it is moving through an interface.

It is pure mythology to suggest that any part of a program can be an interface, as can be seen from the preceding definition. If the part of the program in question is changing information then it is not an interface. If the information is passed through unchanged then, by definition, it is an interface. Whether it is an internal interface or one accessible from outside the program is a second-order (but often important in the legal context) question.

It is also convenient mythology to question whether the law cannot define "interface" when it can be defined precisely and completely in computer science terms, with less than 20 plain English words used with their common semantics.

To suggest that a competitor would merely declare each element of a computer program to be an interface and therefore reusable in their own clone produce is a case of legal logic *extensio ad mythologia*. Interfaces, to a programmer at least, are easily definable and easily identifiable. It is technically infeasible, for all of the reasons described above, to attempt to misappropriate a complete program piecemeal. The resulting code would be unworkable, unmaintainable and more to the point, unmarketable (and thereby unsuccesful).

"...permitting decompilation is more likely to lead to an increase in imitation and a proliferation of clones rather than greater innovation." [U.S. Trade representative Carla Hills, writing to Frans Andriessen, Vice President of The Commission of the European Communities, about the EC Software Directive, undated but presumed to be in late summer, 1990].

This myth has a disconcerting ring to it — it sounds as though it *ought* to be true, but it ignores the ever-present constraint of software development: end-users want software that is easy to use, and the easiest software to use is a program that is similar to something they already know. End-users, learning to use programs, must also build mental models in the same way that anyone doing reverse engineering does. Clearly, therefore, if a new product is similar to something they already know, then it will be more attractive to them.

For example, WordPerfect, not the easiest of word processors to learn and use, gained its popularity because it was very similar to Wang's word processor and many users had already learned that. SuperCalc, Lotus 1-2-3 and Wingz are easier to learn because of similarities to other spreadsheet programs.. Users of the Apple Macintosh and its application programs are enthusiastic of their ease of learning and use—all of the programs have a familiar interface to the user.

Suggesting that decompilation will increase the number of "clone" programs is at the very best, specious reasoning. Clones will still happen without reverse engineering because it makes good economic sense for both developers and users to have clone products. Furthermore, to suggest that if the software industry cannot imitate, the only thing it can do is innovate and this will somehow benefit society, is simplistic and flies in the face of the factors behind the microcomputer revolution. Without "clones," the IBM PC could not have served as a defining standard. Although by some industry analysts' reckoning, IBM has only seen 10 cents of every dollar made by vendors in the PC industry, can anyone seriously question that the explosion of PC clones has not served societal needs, offering choice to purchasers and competition to vendors?

"When a company decompiles a competitor's program, it potentially obtains access to every detail of the second program's functioning." [July 1990 Position Paper from the IBM-led Software Action Group for Europe.]

This is not true. Decompilation, as has been described, cannot reveal "every detail" of a program's functioning because not all the details are in the computer executable form of the program. Those details that *are* there are very low-level and must be hard-won from the code. Details of the high-level functioning of the program are simply not present.

"It is one thing to allow a company to decompile its competitor's program so as to develop a new product that will attach (interoperate) to it. It is quite another, however, to

decompile a program as part of an effort to replace the program on the market. Such a practice would depart radically from the existing laws in EC member states and the legal rules in other industrial countries, such as the United States and Japan. It would benefit a small number of companies that have staked their future on copying their competitor's products, but it would hurt the overwhelming majority of the industry, both in Europe and elsewhere." [July 1990 Position Paper from the IBM-led Software Action Group for Europe (SAGE).]

Again there is this myth that large-scale decompilation is used as a tool to develop competitive products. This is just not true. It is not cost-effective to use large-scale decompilation because it takes too much effort and, in many cases, the information is available far, far more easily from the program's documentation or direct observation of its behavior.

"One cannot describe protocols and interfaces without describing the programs themselves." [IBM, Comments on Chapter 5 of the Green Paper on Copyright and the Challenge of Technology to the Commission of the European Communities, September, 1988].

This is startling mythology when one considers its origin. It is borne of the idea that the computer source code used to transfer information across an interface, or the code used to sustain a particular protocol, must of necessity be written in just one way. Therefore, the syllogism continues, if there is only one way of writing the source code for a particular interface, any description of the interface or the protocol must, of necessity, essentially be a description of the source code.

In the real world of computer science, it is eminently feasible to describe an interface or a protocol without describing the underlying source code — it is also eminently feasible to write the appropriate source in several different ways. It *is* true that two independently created pieces of source code that implement a given interface or a protocol would, to the untrained eye, appear similar (but by no means identical) in nature. But that is because they are trying to solve the same problem.

This particular mythology heads for the absurd if one considers other types of interfaces and protocols: for example, it is incredible to suggest that the human/machine interface (as visible on the screen of the computer) cannot be described independently of the underlying computer program.

Programmers can read the computer executable form of programs directly, therefore they do not need to use decompilers. [An opinion expressed to the author by the Directorate General in the European Commission responsible for the Software Directive]

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This is another case of reasoning *extensio ad mythologia*. A real-world example of this would be reasoning that nail scissors can cut a blade of grass, therefore it is not necessary to have lawn-mowers.

It is true that the computer executable format of a program can be deciphered by a skilled programmer, but programs are too large for it to be feasible not to use a disassembler program to mechanize the deciphering of those small portions of the program that may be required to flesh out details unobtainable by any other means.

"Allowing reverse engineering could result in two software products being independently developed which would appear identical in every way to the user." [Lotus Development Corp. position paper on reverse engineering, November 2, 1988.]

There are two myths present in this statement: firstly that having two identical programs is in some way detrimental to the interest of the user—arguably this might be of considerable benefit to users, giving them freedom of choice; secondly, implying the linkage of reverse engineering and the production of identical competitive products. No such linkage exists. Reverse engineering, per se, has absolutely nothing to do with whether or not one competitive product is identical with another. What little reverse engineering is done for the production of a competitive product is most likely to be done for obscure little details of internal functioning rather than broad-brush external levels of similarity.

"...software developers say that they would rather reverse engineer the source code of a program which they were seeking to copy than to copy the code itself." [Lotus Development Corp. position paper on reverse engineering, November 2, 1988.]

Just not true. Programmers hate to do massive reverse engineering *as much* as they hate being told to do slavish copying of someone else's code. They would far rather be challenged to design their own code given just the specification of the problem to be solved, for it is only this kind of programming that contains the kinds of intellectual creativity that a programmer enjoys.

"Decompilation is not needed to ensure access to computer interfaces. Access exists as matter of the originator's economic self-interest." [Computer and Business Equipment Manufacturer's Association statement on European Community Protection of Proprietary Rights, January 29, 1990.]

Even when the originator of an interface *wants* to publicize an interface and distributes a specification, it is the rule not the exception, that this documentation will not be sufficiently accurate or complete to obviate the need to reverse engineer their code if there is an inexplicable problem.

It is pure mythology to suppose that access to an interface is always in the economic self-interest of the originator. To the contrary, when a dominant player in the industry observes they have a winner on their hands, they have used the courts and copyright and trade secret laws to prevent access or use of their interfaces and protocols. Witness the litigation extant between Ashton-Tate and Fox over the interface language in their products, Atari and Nintendo over the hardware/software interface used to ensure only Nintendo game cartridges will run in Nintendo base units and Apple's sabre-rattling to sue anyone who uses their interfaces to their so-called "toolbox" routines that produce all the graphic images on the screen of the Macintosh.

Truths

Reverse engineering is an integral part of software development. It is required whenever published information or the product under observation fails to yield accurate information about interfaces and protocols.

Reverse engineering is incredibly laborious, taking far more effort than normal software engineering by at least one order of magnitude.

Reverse engineering is not a tool for a software thief. Most software thieves choose to kick the door off the hinges and simply make illicit copies of the software and claim it as their own rather than reverse engineer all or part of the program.

Reverse engineering is not the path of least resistance. It is the remedy of last resort. Ask any programmer.

Reverse engineering occurs in almost every aspect of ordinary human life, but then we call it analysis and encourage it.

Reverse engineering or analysis is vital for innovation in all other aspects of intellectual creativity and serves the same purpose with computer software.

If the European Community (and perhaps then the USA) were to ban reverse engineering, they would be engaging in a form of software protectionism. This protectionism would backfire badly if, for example, the next generation of innovative software were to come from the Pacific Rim—our own programmers could not then develop competitive products.

The reverse engineering debate is provoked by the large software companies, the "haves," as a means of improving their competitive position, when, in fact and almost without exception, the "brand leader" software products of today were all based on the earlier products of other companies using information derived by reverse engineering.

Reverse engineering is practiced by all programmers, even those that work for those companies such as IBM, Apple, Ashton-Tate and Microsoft, who wish to outlaw reverse engineering.

Mr. MOORHEAD. The next witness will be Mr. August W. Steinhilber, chairman of the Educators' Ad Hoc Committee on Copyright Law.

STATEMENT OF AUGUST W. STEINHILBER, CHAIRMAN, EDUCATORS' AD HOC COMMITTEE ON COPYRIGHT LAW

Mr. STEINHILBER. Thank you, Mr. Moorhead. Thank you for the opportunity to appear before this committee.

A little bit of discussion first about who we are. I realize you have already read into the record a little bit about the Educators' Ad Hoc Committee and that it has been in existence since the 1950's. But I think one of the important aspects of the Educators' Ad Hoc Committee is not only that we represent everything from kindergarten through postgraduate education and all the libraries, whether they are research libraries, public libraries or institutional libraries, it is that we have an unusual responsibility, unlike commercial interests which appear before your committee. Their interest automatically is the bottom line: What makes business work for them, what is the best way to maximize profit. There is nothing wrong with that particular viewpoint.

However, our problem is that we cannot take that kind of narrow approach. We have to look at two things:

One, how do we make sure that the material that is being produced continues to be produced. So that the source is not dried up we want to encourage the competition and we want to encourage the industry. But at the same time we have to look at the educational uses and what is good for the total educational system in the United States, and that at the same time we don't injure what we call a real market, not this potential market that everyone talks about in copyright law. We always are being asked to testify on behalf of commercial interests. Would you support our bill? And we ask would you not support our bill? We jokingly call it ironic that in the past 40 years we found that never, not in one instance has the commercial interests ever supported any proposal that the educators have ever submitted before this committee.

This is by way of saying that the bill before you is an attempt to help and assist commercial interests. It is not as I have seen in some publications and some materials that this is an attempt to encourage scholarship in its nth degree or it will help the American educational system. It does a good job in terms of one thing: It is a commercial bill for commercial interests. And, as long as it is portrayed by that, we have no difficulty.

Our concern is not what the bill does but what the bill does not do. First of all, it does not really address any of the issues in fair use which we have brought to this committee over the years, but that is for a different day. And we also are concerned that the bill centers upon, first of all, publishing of the work and yet fair use in an unpublished work is not limited to publishing. The old expression is we don't want to be the innocent victims of a particular piece of legislation.

For example, while there is a great deal of discussion in this committee and in the testimony about how an unpublished work is in another work, at the same time we are interested in making sure that the things that we currently do are not inadvertently injured. For example, if we have some unpublished work in our own university library, why cannot copies of that be used in a class on a particular subject which that is pertinent, or why cannot an unpublished work which we already have in a university library or a school library be shown on an overhead projector.

There are many uses of unpublished work which are not in the commercial field and which do not require a republication, and we want to make sure those are protected.

A second concern on unpublished work is—it has already been discussed, and that is decompilation of source codes and object codes. We need the opportunity and have always contended that fair use covered our research whether it is at the high school level or at the college level of looking at what those codes do, what are the unpublished technical documents around those, do those claims of either the software publisher and/or the hardware manufacturers—are they true? Do they make sense? Can we be sure that they will do the job they can? Or are we going to be looking at better ways of doing things? And why cannot we use everything from thorough review of something as both published and published at the same time? We have never quite understood how source codes can be available and not available simultaneously, but at least it should be subject to fair use.

And last, I have already made reference to the fact that we already have in school libraries, public libraries, university libraries quite a bit of unpublished work already in existence, and we use that, obviously, for not-for-profit purposes. In any particular piece of legislation that is going through this committee be sure that inadvertently those things that we currently have in our possession which are currently open to the public all of a sudden we don't find ourselves with another set of legal hurdles which we have to jump over.

Thank you very much for this opportunity.

Mr. MOORHEAD. Thank you.

[The prepared statement of Mr. Steinhilber follows:]

STATEMENT OF AUGUST W. STEINHILBER
ON BEHALF OF THE
EDUCATORS' AD HOC COMMITTEE ON COPYRIGHT LAW
BEFORE THE
SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION OF THE
HOUSE COMMITTEE OF THE JUDICIARY
ON
THE COPYRIGHT AMENDMENTS ACT OF 1991

H.R.2372

June 6, 1991

Thank you, Mr. Chairman, for inviting our group to testify before your committee. I am August Steinhilber and am chairman of the Educators Ad Hoc Committee on Copyright Law. The committee consists of non-profit organizations representing elementary and secondary schools, colleges and universities, and libraries. Our respective organizations also represent teachers, professors, librarians and school board members. For example, I am general counsel of the National School Boards Association.

One of the principal concerns of the Educators' Ad Hoc Committee on Copyright Law has been the preservation of the limited right of educators, librarians and scholars to use copyrighted materials that they need for teaching, scholarship and research, while simultaneously trying to teach our members to respect the rights of copyright owners. The committee has been in existence since the 1950's.

Those of us in education have been concerned about the applicability of the fair use doctrine to unpublished works since the U. S. Supreme Court issued its opinion in Harper and Roe v. Nation Enterprises, 471 U.S. 539 (1985). Subsequently the Second Circuit has issued two additional opinions involving unpublished works, Salinger v. Random House, Inc., 811 F.2d 90 (1987) and New Era Publication International v. Henry Hold and Company, 873 F.2d 576 (1989).

Within the Second Circuit's jurisdiction resides a great deal of the nation's book and magazine publishing industry. Thus the concern has been heightened not by us but by those financially impacted. There have been several legislative attempts at amending section 107 of Title 17, of the U.S. Code to correct the problem. The first attempt was a relatively simple amendment to Section 107 to insert the words *whether published or unpublished* after the words *fair use of a copyrighted work*. Later, the following legislative language was proposed:

> *Where unpublished material is used in a work of or pertaining to history, biography, fiction, news and general interest reporting, or social, political or moral commentary, the absence of publication shall be considered as an element in determining whether the use is fair, but such absence shall not create a presumption that, or be solely determinative of whether, the use is unfair.*

The language found in H.R. 2371 Title I is the newest version.

PROBLEMS AS SEEN THROUGH THE EYES OF EDUCATORS, SCHOLARS AND LIBRARIANS

The Educators' Ad Hoc Committee on Copyright Law met last year and voted to support legislation that would amend the Copyright Law to make it clear the fair use doctrine applied to unpublished works. We actively supported the initial legislation on this subject. However, it must be said that the current legislative purpose is not designed principally to help scholarship, educational research, etc. for those of us in education. It is principally supported by the publishing industry because of its own financial and business concerns -- and there is nothing wrong with their concerns; however, it should not be represented in terms of something greater than it is. We have seen some press releases making assertions that scholarship is in danger and that the rights given to education under fair use have been undermined by recent court decisions -- at best this is an exaggeration.

Over the past two years, representatives of organizations pushing for this legislation have sought our support for this bill just as they have sought our support for other legislative proposals for which they seek passage. In short, they need or desire our *good housekeeping seal of approval* that educators support their position. We do not oppose this legislation and agree something should be done, but must point out that it does not solve our issues with respect to fair use. In the past we have suggested that our problem with fair use is that current Section 107 merges the needs of commercial usage with the needs of educations and librarians. The committee may wish to consider restructuring Section 107 to separate these needs. There are legitimate concerns by copyright owners with fair use that the doctrine should not be expanded to those who use the doctrine in a business setting.

TECHNICAL CONCERNS

This bill appears to be concerned where unpublished material is used in a work. However, fair use can apply to unpublished material not used in a work such as the reproduction of unpublished material for classroom use or copies made by an educator or librarian for scholastic research purposes. We encourage students to do original research, meaning use of original research documents and not merely to refer to secondary materials already published. The bill should not discourage such research.

Our next concern is in the field of technical education. I understand the computer industry's concern about decompilation of computer source codes. However, this bill should not directly or indirectly expand copyright protection where it does not now exist. We contend now that a professor or teacher may use unpublished business and technical documents in the development of reports/papers/ findings on how computers work or, indeed, whether some of the claims of computer manufactures are justified by empirical information. We have also considered decompilation for testing purposes fully consistent with fair use. It is important to note that there never has been a congressionally encouraged development of fair use guidelines for computer software. Under the watchful eye of this committee, guidelines have been developed for print material, library use, music use and television taping, but to date, there are no universal guidelines for computer software.

Since this bill appears to only consider modifying certain court rulings, we suggest the committee consider that there are several types of unpublished works not covered in those cases. There are a great deal of unpublished materials available for public inspection but not commercially distributed. These tend to be permanently housed in a university or library. The bill seems to be aimed at those unpublished works which are not available for public inspection. In whatever language is finally passed, we trust that the unrestricted access that we currently enjoy with unpublished works available to the public is not subject to any new legal restriction.

Again, thank you for inviting us to appear.

WASHINGTON OFFICE
AMERICAN LIBRARY ASSOCIATION
110 MARYLAND AVENUE, N.E. • WASHINGTON, D.C. 20002 • (202) 547-4440

RESOLUTION ON "FAIR USE" OF UNPUBLISHED SOURCES

WHEREAS, Libraries and their users are beneficiaries of the scholarship of biographers, literary critics, historians and others; and

WHEREAS, The canons of scholarly research require that serious and responsible researchers draw upon and quote from unpublished primary source materials; and

WHEREAS, The constitutional mandate to create copyright laws represents a careful balance between the rights of authors, publishers, and the public; and

WHEREAS, That mandate and those laws encourage free and open expression and the fullest possible public access to that expression; and

WHEREAS, The freedom of scholars to use quotations from unpublished primary sources is in serious jeopardy; and

WHEREAS, Recent rulings of the U. S. Second Circuit Court have had an inhibiting effect on many forms of research which are of ultimate benefit to libraries and their patrons and have made it legally difficult to quote even limited amounts of unpublished materials without obtaining authorization or consent; and

WHEREAS, A "fair use" doctrine for unpublished materials is needed to balance both the protection of copyright for authors and the encouragement of research by scholars; and

WHEREAS, Representative Robert Kastenmeier and Senator Paul Simon have introduced legislation (HR 4263 and S. 2370) that would clarify the "fair use" of quotations of unpublished materials; now, therefore, be it

RESOLVED, That the American Library Association express its support and urge Congress to enact legislation which would eliminate the distinction between published and unpublished materials with regard to the fair use of quotations; and, be it further

RESOLVED, That copies of this resolution be transmitted to the Judiciary Committee of both houses of Congress.

Adopted by the Council of the
American Library Association
Chicago, Illinois
June 26, 1990
(Council Document #93)

Mr. MOORHEAD. Before Ralph Oman leaves, I know you have listened to the issue that was raised about the use of classroom materials and how that might be affected by this law. I would appreciate it if you could get us an answer to that concern that has been expressed.

Mr. OMAN. Yes, sir. I would be happy to do that, Mr. Chairman.

Mr. MOORHEAD. Thank you.

Mr. MOORHEAD. Our next witness will be Prof. Shira Perlmutter of the School of Law, Catholic University.

Welcome.

STATEMENT OF PROF. SHIRA PERLMUTTER, COLUMBUS SCHOOL OF LAW, THE CATHOLIC UNIVERSITY OF AMERICA

Ms. PERLMUTTER. Good morning. I appreciate the opportunity to testify today on H.R. 2372. I will confine my remarks to the first two titles of the bill, speaking briefly about renewal and focusing primarily on fair use.

I strongly support the renewal title of the bill. By providing for automatic renewal of copyrights secured between 1963 and 1977, it ensures that rights that have already been made available will not be defeated through lack of knowledge or expertise.

These older copyrights are still governed by the two-term system of the 1909 act, which conditioned enjoyment of the renewal term on filing an application with the Copyright Office in proper form and at the proper time. Under this system, countless works, including classics such as Frank Capra's movie "It's A Wonderful Life," have fallen prematurely into the public domain. Artists fail to file because of unfamiliarity with legal requirements; corporations fail to file because of errors in recordkeeping or unrelated business problems. For example, the corporation that was set up to produce "It's A Wonderful Life," went bankrupt shortly after the film was released. Even those who do file, and that includes some copyright lawyers, sometimes forfeit renewal terms because of confusion over highly technical filing rules.

I see no adequate justification for continuing to penalize misunderstanding and inadvertence by the loss of more than half the allotted term of copyright protection—now 47 years out of a total possible duration of 75. I commend the subcommittee for taking steps to eliminate this trap for the inexpert.

As to the proposed fair use amendment, there is no question that a problem does exist. Even a casual observer can see that the publishing industry is in turmoil over the implications of the second circuit's recent decisions in *Salinger* and *New Era*. I do not believe, however, that a statutory amendment is the best solution.

The turmoil may be traced to several statements in *Salinger* and *New Era* suggesting that it will be very difficult to establish fair use of unpublished works, and that an injunction will be virtually automatic upon rejection of a fair use defense. These statements have understandably caused authors and publishers great concern.

Let me say at the outset that I share that concern. If these statements constituted established law in the second circuit, the home of many of this country's leading publishing houses, I would see a need for legislation. The question is, however, whether the second circuit's decisions have actually changed prior treatment of unpublished works, effectively ruling out the possibility of fair use. Because I do not believe they have, I do not think legislation is necessary to reverse them.

The *Salinger* and *New Era* decisions are derived from nearly two centuries of case law culminating in the Supreme Court's 1985 decision in *Harper & Row* v. *The Nation.* As an entirely judge-made doctrine until 1976, fair use was not applied to unpublished works unless they had been voluntarily disseminated. In 1976, Congress codified the doctrine of fair use for the first time in section 107 of the new act. Interpreting that provision, the Supreme Court held in *Harper & Row* that, while there could now be fair use of unpublished works, the fact that a work is unpublished is "a critical element of its 'nature'" under the second fair use factor. It described the scope of fair use as "narrower with respect to unpublished works," and stated that "the unpublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use."

Both *Salinger* and *New Era* continue *Harper & Row's* treatment of unpublished works, holding them less amenable than published works to claims of fair use. In neither case did the second circuit hold that the unpublished nature of the plaintiff's work in itself barred the fair use defense. Rather, the court examined all four of the statutory fair use factors before coming to the conclusion that, on balance, the use was not fair. When read in context, *Salinger's* controversial statements are plainly unintentional overstatement. Their repetition in *New Era* is pure dictum, albeit disturbing dictum.

In later opinions in the *New Era* case, as well as in scholarly articles, a majority of the judges now sitting on the second circuit, including the author of the *Salinger* opinion, have repudiated or cut back the controversial language. The decisions in the years since *Salinger* and *New Era* are also reassuring. They make clear that neither the second circuit nor the lower courts read *Salinger* and *New Era* as establishing a virtual per se rule against fair use of unpublished works. Rather, the courts have upheld or refused to dismiss fair use defenses despite the unpublished nature of the works in question.

Why then is there still such concern? The problem today is more one of perception than of reality. Even after winning the subsequent cases, publishers look at the controversial language and shy away from the risk that a court may apply it overliterally.

Their reluctance to invest substantial resources in a venture that a court may find unlawful and enjoin is understandable. This risk, however, is inherent in the nature of the fair use defense as a flexible, equitable doctrine requiring the balancing of numerous factors. As a former practicing lawyer, I am well aware of the difficulty of advising clients on fair use claims. It is very frustrating not to be able to say, "Go ahead, you're within your rights," but instead, "It depends." But this uncertainty existed before *Salinger* and before *New Era* and will continue to exist if the proposed amendment is passed.

Last week, the subcommittee heard testimony from representatives of the publishing community that *Salinger* and *New Era* mean that the use of a single sentence from an unpublished memorandum—anything more than one or two words—could not be fair use. These statements demonstrate that overreaction is compounding the problem. The use of one or two words from any work, whether published or unpublished, could not conceivably meet the test of substantial similarity, and therefore it would not even be necessary to invoke the fair use defense. And even the most extreme language of the second circuit acknowledges that at least a minimal taking of unpublished expression could qualify as fair.

Given all of this, what should be done? In my view, nothing legislatively. The courts have gone a long way toward resolving the problem. Rather than taking the issue prematurely away from the courts, which have historically overseen its development, it would be preferable to let the normal case-by-case process continue.

Mr. HUGHES. Thank you very much.

[The prepared statement of Ms. Perlmutter follows:]

TESTIMONY OF PROFESSOR SHIRA PERLMUTTER
BEFORE THE SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION
HOUSE COMMITTEE ON THE JUDICIARY
ON H.R. 2372
JUNE 6, 1991

Good morning. My name is Shira Perlmutter. I am a professor at the Columbus School of Law of The Catholic University of America, where I teach Copyright Law. I thank Chairman Hughes, Mr. Moorhead, and members of the Subcommittee for the opportunity to testify today on H.R. 2372.

The bill has three titles: an amendment to the fair use provision of the 1976 Copyright Act, section 107; an amendment to the Act's renewal provision, section 304; and extension of the National Film Preservation Board. I will confine my remarks to the first two titles, speaking briefly about renewal and focusing primarily on fair use.

Title II - Copyright Renewal Act of 1991

I strongly support this title of the bill. By providing for automatic renewal of copyrights secured between 1963 and 1977, it ensures that rights already made available will not be defeated through lack of knowledge or expertise. The bill ameliorates the harsh results caused by a remnant of the 1909 Act, which granted an original copyright term of 28 years, with an additional 28-year "renewal term" only if a renewal application was filed with the Copyright Office during the last year of the original term. Failure to file such an application in the proper name, in proper form, and at the proper time cast the work irretrievably into the public domain. Under this system, countless works, including the classic motion pictures "It's A Wonderful Life" and "A Star Is Born," lost their renewal terms for failure to comply with a complex and esoteric body of rules. In enacting the 1976 Act, Congress fortunately abandoned this unwieldy system in favor of a single term of protection, measured by the life of the author plus fifty years.

The two-term system was retained, however, for works already in their first term of federal copyright protection when the 1976 Act took effect, a substantial number of which will come up for renewal during the next fourteen years. As to these works, there continues to be a serious risk that copyright owners will inadvertently forfeit the second term which Congress has already determined they are entitled to enjoy. This is not a remote possibility; it happens every day. Artists fail to file because of unfamiliarity with legal requirements; corporations fail to file because of errors in recordkeeping, or unrelated business problems. (In Frank Capra's case, the corporation set up to produce "It's A Wonderful Life" went bankrupt shortly after the film was released.) Even those who do file, including lawyers, sometimes forfeit copyrights because of confusion over highly technical filing requirements.

I see no adequate justification for continuing to penalize misunderstanding and inadvertence by the loss of more than half the allotted term of copyright protection.[1] I commend the Subcommittee for taking steps to eliminate this trap for the inexpert.[2]

I do note that the bill does not safeguard for non-filing copyright owners the entire range of exclusive rights they would enjoy if they did file a proper renewal application. In one important respect, H.R. 2372 continues to differentiate between those who file renewal applications and those who do not. I refer to proposed section 304(a)(4)(A) of title 17, found in section 202 of the bill. This section withholds from the copyright owner who fails to comply with filing requirements what can be the most valuable of the copyright bundle of rights: the ability to renegotiate the price for use of a derivative work made before the full value of the copyrighted work can be accurately assessed. Indeed, it is precisely those works for which the bill will make a real difference--those that still have commercial value after twenty-eight years--that are most likely still to have marketable derivative works. This exception is thus not a minor detail of the bill, but will have a major economic impact. If, however, as is my understanding, this exception is necessary in order to achieve consensus, it would certainly be preferable to pass the bill as is than to risk its defeat.

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[1]. The 1976 Act added 19 years to the renewal term, increasing it to 47 years out of a total potential duration of 75 years. 17 U.S.C. § 304(a)-(b) (1978).

[2]. Continuing to condition the enjoyment of substantive rights on compliance with formalities is particularly inappropriate today in light of Congress's decision in 1976 to make the initial attachment of federal statutory protection automatic upon creation of a work. See 17 U.S.C. § 302(a) (1978).

Title I - Fair Use

As to the proposed fair use amendment, there is no question that a problem exists. Even a casual observer can see that the publishing industry is in turmoil over the implications of the Second Circuit's recent fair use decisions. Before taking legislative action, however, three questions should be examined carefully: (1) What is the nature and scope of the problem? (2) Is statutory amendment the best way to deal with it? and (3) Will the proposed language solve the problem without creating new ones? In my opinion, analysis of the first question indicates that statutory amendment is not the best resolution. If the Subcommittee determines otherwise, I believe the proposed language requires some modification to accomplish its desired purpose.

1) The Nature and Scope of the Problem

The immediate cause of the problem is language in two Second Circuit opinions issued in 1987 and 1989, Salinger v. Random House, Inc.[3] and New Era Publications International ApS v. Henry

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[3]. 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987).

Holt & Co.[4] Both involved claims that a biographer's quotations from the unpublished letters or diary of a person of considerable public interest (writer J.D. Salinger and Church of Scientology founder L. Ron Hubbard, respectively) constituted fair use. Salinger reversed District Judge Leval's refusal to issue a preliminary injunction based on his favorable assessment of the fair use defense; New Era affirmed the same judge's refusal, based primarily on First Amendment concerns, to issue a preliminary injunction, but did so on different grounds. In reaching these results, the majority opinion in each case made statements in dicta that have caused authors and publishers great concern. These statements suggest that it will be very difficult to establish fair use of unpublished works, and that an injunction will be virtually automatic upon rejection of a fair use defense.

Any rational assessment of the impact of the statements must begin with an examination of their actual language rather than reliance on broad characterizations. The language usually identified as particularly pernicious is as follows:

Salinger: "If [the biographer] copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined. . ."[5]

"[W]e think that the tenor of the [Supreme] Court's entire discussion of unpublished works [in Harper & Row] conveys the idea that such works normally enjoy complete protection against copying any protected expression."[6]

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[4]. 873 F.2d 576 (2d Cir.), pet. for rehearing en banc denied, 884 F.2d 659 (2d Cir. 1989), cert. denied, 110 S. Ct. 1168 (1990).

[5]. 811 F.2d at 96.

New Era: "[W]e made it clear in Salinger that unpublished works normally enjoy complete protection. . ."[7]

"Since the copying of 'more than minimal amounts' [quoting Salinger] of unpublished expressive material calls for an injunction barring the unauthorized use,. . . the consequences of the district court's finding [of infringement not excused by fair use] seem obvious."[8]

Let me say at the outset that I share the publishing community's concern. If these statements constituted established law in the Second Circuit, the home of many of this country's leading publishing houses, I would see a need for legislation. You have heard eloquent testimony from other witnesses both this year and last about the importance to works of non-fiction of the ability to quote from previously unpublished material, and the great loss to the American public if biographers, historians, and journalists are not able to present to their readers primary sources rather than their own characterizations of those sources. No one would dispute that these are weighty concerns, and that there should be no per se rule barring fair use of unpublished works. The question is, however, whether the Second Circuit's decisions have actually changed prior treatment of unpublished works, and effectively erected such a bar. Because I do not believe they have, I do not think legislation is necessary to reverse them.

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[6]. Id. at 97.

[7]. 873 F.2d at 583.

[8]. Id. at 584.

Historical Treatment of Unpublished Works

When placed in historical perspective, the Salinger and New Era decisions do not represent a sharp break with traditional fair use analysis. The doctrine of fair use has been developed by English and American courts for nearly 200 years. Based on concepts of reasonableness and equity, and requiring a balancing of the first author's rights against a second author's freedom to build on prior works, the doctrine has always been a flexible one, highly dependent on the facts of the particular case. As an entirely judge-made doctrine until 1976, it was not applied to unpublished works unless they had been voluntarily disseminated (although not "published" in a technical sense).[9] The rationale for this exclusion was the author's common law right of first publication--the right to decide whether and under what circumstances the work would be published. At common law, the author's control over his or her unpublished manuscript was absolute. If the author did not wish to make the work available at all, but preferred to keep it private, others had no right to counteract this decision.[10]

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[9]. See W. Patry, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 436-442 (1985).

[10]. Id.; Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 551 (1985), quoting American Tobacco Co. v. Werckmeister, 207 U.S. 284, 299 (1907) ("Under common law copyright, 'the property of the author . . . in his intellectual

The 1976 Act abolished common law copyright for unpublished works, substituting a unitary federal statutory scheme of protection for all works fixed in tangible form, whether published or unpublished.[11] Congress also codified fair use for the first time. It did so over opposition from a number of interested parties as well as scholars and practitioners who felt that the doctrine was not suited for codification and was best left to the courts.[12] As a compromise, Congress chose not to define fair use or to confine the courts in their consideration of all of the circumstances. Instead, it enacted section 107, which states only that fair use of a copyrighted work is not an infringement, providing several examples of purposes likely to qualify as fair use, and listing four non-exclusive factors, taken directly from prior case law, that courts are required to consider. In the legislative history, Congress made clear that it wished to leave the continued development of fair use to the judiciary, providing only some guidance to its application, based on criteria developed by the courts:

> The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free

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creation [was] absolute until he voluntarily part[ed] with the same'").

[11] See H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 129 (1976).

[12] See Patry, supra n. 9, at 218, 223-224, 233.

> to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.[13]

Section 107 did not distinguish in any way between published and unpublished works, despite the prior case law holding fair use inapplicable to unpublished works protected by common law copyright. Interpreting this provision in 1985, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Supreme Court held that there could be fair use of unpublished works, but that the fact that a work is unpublished is a "critical element of its 'nature,'" stating, "[T]he scope of fair use is narrower with respect to unpublished works."[14] The Court also held, citing a 1975 Senate report, that "the unpublished nature of a work is '[a] key, though not necessarily determinative, factor' tending to negate a defense of fair use."[15]

The Salinger and New Era Decisions

It was against this backdrop that the Second Circuit decided *Salinger* and *New Era*. Both decisions interpret the Supreme Court's opinion in *Harper & Row* and attempt to apply its statements about fair use of unpublished works to the facts before them. In both cases, the Second Circuit found a likelihood of infringement not excused by fair use. In Salinger, it directed the district court to enjoin publication of defendant's manuscript so long as it contained the offending material. In New Era, it held that an injunction was unavailable, but only because of the plaintiff's delay in seeking such relief.

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[13]. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976).

[14]. 471 U.S. 539, 553 (1985).

[15]. *Id.* at 551, citing S. Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1975). The 1966 and 1967 House Judiciary reports contained similar language. *See* H.R. No. 2237, 89th Cong., 2d Sess. 63 (1966); H.R. REP. NO. 83, 90th Cong., 1st Sess. 34 (1967). This discussion was incorporated by reference in the 1976 House Judiciary Committee report. *See* *Harper & Row*, 471 U.S. at 554.

While the language quoted above may sound more extreme than prior law, an analysis of the opinions in their entirety, as well as subsequent events, makes it much less alarming. To begin with, the statements must be read in context. The "deserves to be enjoined" language in Salinger was written in passing in rejecting an argument of the district court relating to the first fair use factor, the nature and purpose of the use; it was not related to the Second Circuit's consideration of the appropriate remedy. Its repetition in New Era was pure dictum, as injunctive relief was held unavailable based on laches. Moreover, the offending language has since been repudiated as unintentionally overbroad by its writer as well as by seven other judges of the Second Circuit.[16]

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[16] See opinions written in connection with denial of rehearing en banc in New Era Publications International ApS v. Henry Holt & Co., 884 F.2d 659 (2d Cir. 1989). The concurring opinion by Judge Miner, joined by Judges Meskill, Pierce and Altimari, described this language in Salinger as "infelicitous" and stated, "All now agree that injunction is not the automatic consequence of infringement and that equitable considerations always are germane to the determination of whether an injunction is appropriate." Id. at 661. It further noted that the panel

As to the "normally enjoy complete protection" language, the key word is "normally." Taken in context, this language clearly was not meant to rule out the possibility of fair use. It occurs in an effort to interpret *Harper & Row*, and is followed immediately by the conclusion that the Supreme Court's use of the words "[n]arrower 'scope' seems to refer to the diminished *likelihood* that copying will be fair use when the copyrighted material is unpublished."[17] Obviously, then, as a majority of the Second Circuit judges have since confirmed, it is still possible to make fair use of an unpublished work.[18]

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majority in the prior *New Era* opinion (Judges Miner and Altimari) had proposed to amend that opinion to add the words "under ordinary circumstances" to the language about injunctions. *Id.* at 662.

The dissent, written by Judge Newman, the author of *Salinger*, and joined by Judges Oakes, Kearse and Winter, went further, seeking to clarify the relevant standards after *Salinger* and *New Era* in order "to avoid misunderstanding on the part of authors and publishers as to the copyright law of [the Second] Circuit." *Id.* It emphasized that the offending language in the prior opinion was mere dictum, and cautioned that the denial of rehearing did not mean that the Circuit was committed to that language. *Id.* Addressing the original phrasing in *Salinger*, the dissenters explained that the sentence "was concerned with the issue of infringement, not the choice of remedy, and that "[i]t would have been preferable to have said. . . '[the biographer] deserves to be found liable for infringement' rather than 'deserves to be enjoined.'" *Id.* at 663, n.1.

[17]. 811 F.2d at 97.

[18]. With regard to this language too, the opinions written in connection with the denial of *en banc* rehearing are instructive in suggesting the direction the court is likely to take in future cases. The four dissenters "do not believe that biographers and journalists need be apprehensive that this Circuit has ruled against their right to report facts contained in unpublished writings, even if some brief quotation of expressive content is necessary to report those facts accurately," and express confidence that the original opinion "has not committed the Circuit to the proposition that the copying of some small amounts of unpublished

The reasoning and holdings of both Salinger and New Era also support this view. In neither case did the Second Circuit say that the unpublished nature of the plaintiff's work in itself barred the fair use defense. Rather, the court examined all four of the statutory factors before coming to the conclusion that, on balance, the use was not fair. Indeed, the Salinger court noted that it would likely have reached the same result even if the work had been published[19]--a conclusion that seems eminently reasonable given the amount and expressive quality of the material taken.[20] While the fair use discussion in New Era is indeed troubling, it too included a consideration of the other statutory factors. (It is worth noting that there is ample room for disagreement even among the reasonable minds of federal judges in applying the fair use doctrine; reversals and dissents

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expression to report facts accurately and fairly can never be fair use." 884 F.2d at 662-63. In response, the concurring opinion states that "[t]his confidence is not misplaced, because there is nothing in the panel majority opinion that suggests otherwise! Indeed, the panel majority does not even bar the use of 'small amounts of unpublished expression' to enliven the text." Id. at 661. It further notes that the defendant might have prevailed on the fair use defense if the third factor, the amount and substantiality of the material taken, had been resolved in its favor--hardly the result of applying a virtual per se rule. Id.

[19]. See Salinger, 811 F.2d at 100 ("We seriously doubt whether a critic reviewing a published collection of the letters could justify as fair use the extensive amount of expressive material Hamilton has copied").

[20]. Even Judge Leval has reconsidered his original reaction, stating that he now agrees with the Second Circuit and believes that the biographer's taking should not have qualified as fair use. See Leval, "Toward a Fair Use Standard," 103 HARV. L. REV. 1105, 1113 (1990).

are the rule rather than the exception in fair use cases.)[21]

Subsequent Developments

Still one might find ground for concern. Even dicta by the Second Circuit may well influence the decisions of other courts. But subsequent developments go a long way toward allaying that concern. First, the judges involved in the Salinger and New Era cases have been made aware of the furor these opinions have caused. Unable to revisit the issue without the vehicle of a case presenting an appropriate context, several have responded by seeking to clarify their intent publicly in scholarly articles. In articles published during the past two years, Judges Miner, Newman and Oakes, panel members in the two cases, have made clear that they believe there can be fair use of unpublished works and that an injunction is not automatic upon a finding of infringement, and that they do not interpret the Second Circuit opinions to hold to the contrary.[22]

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[21]. Id. at 1105-1106, n. 9.

[22]. See Oakes, "Copyright and Copyremedies: Unfair Use and Injunctions," 18 HOFSTRA L. REV. 983 (1990) (expressing view that first amendment considerations are relevant to decision whether to grant injunctive relief); Miner, "Exploiting Stolen Text: Fair Use or Foul Play?" 37 J. COPR. SOC'Y 1 (1989) (proposing a change in the law to distinguish between technically unpublished materials that have been voluntarily disseminated and those that have not, barring any fair use of the latter but making the former subject to fair use to the same extent as published works); Newman, "Not the End of History: The Second Circuit Struggles With Fair Use," 37 J. COPR. SOC'Y 12 (1989) (explaining the narrowness of the restraints arguably imposed by Salinger and New Era and seeking to reassure biographers, historians and journalists that their alarm is unwarranted). See also Leval, "Toward a Fair Use Standard," 103 HARV. L. REV. 1105 (1990) (expressing concern about effect of

Perhaps most significant is Judge Newman's characterization of his own language in Salinger as "a partial overstatement," and his stated view that "the biographer may make some use of unpublished expression when necessary to convey factual information accurately."[23] With the clairvoyance of hindsight, he has even gone so far in his New Era en banc opinion as to essentially retract his statement that "a biographer who uses more than minimal amounts of expression from an unpublished work deserves to be enjoined," proposing as a better choice of words the phrase "deserves to be found liable for infringement,"[24] and thereby leaving open the important question of remedy. While dissents or statements in articles by individual judges are of course not binding law, it is unrealistic to imagine that other judges faced with interpreting these opinions will ignore the authors' elucidations of their meaning.

Even more reassuring is the court record. Opinions issued in the years since Salinger and New Era have made clear that the Second Circuit is still receptive to the special fair use needs of biographers and historians, and that neither the Second Circuit nor the lower courts read those cases as establishing a virtual per se rule against fair use of unpublished works. In another case brought by New Era Publications, this time involving

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Second Circuit dicta).

[23]. Newman, "Not The End of History," supra n. 22, 37 J. COPR. SOC'Y at 18, n.13.

[24]. See note 16 above.

use of the published works of L. Ron Hubbard, the Second Circuit expressed sympathy for the legitimate need to use some expressive quotation to communicate to the reader the character of the person being quoted.[25] And the four subsequent reported cases within the Second Circuit involving the use of unpublished materials indicate that the courts are not being led astray by the Salinger and New Era dicta.

The only such opinion issued by the Second Circuit itself is particularly encouraging. Written by a member of the original New Era panel majority, it resolved the second fair use factor against the defendant because the plaintiff's works (secure tests) were unpublished, but nevertheless reversed summary judgment rejecting the fair use defense, remanding to the district court for trial on the fourth fair use factor.[26] Of the three district court opinions, two upheld claims of fair use (one relying on Harper & Row's treatment of unpublished works without even citing Salinger or New Era).[27] Indeed, the sole case to involve a biographer's use of a subject's unpublished letters was extremely favorable for biographers, as it relied on a "strong presumption that if the allegedly infringing work is a biography, factor one favors the biographer," and actually resolved the second fair use factor in favor of the biographer despite the unpublished nature of the letters.[28] The only opinion to reject the fair use defense was uncontroversial, as the defendant reproduced the plaintiff's works virtually in their entirety--a use that would not be fair even if the works had been published.[29] Thus, the dire consequences so many feared have not materialized, and seem much less likely to do so in the future.

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[25]. New Era Publications International ApS v. Carol Publishing Group, 904 F.2d 152, 156 (2d Cir. 1990), cert. denied, 111 S. Ct. 297 (1991) ("[E]ven passages used for their expression are intended to convey the author's perception of Hubbard's hypocrisy and pomposity, qualities that may best (or only) be revealed through direct quotation"; distinguishing the prior New Era case's holding on this point without reference to the unpublished/published distinction).

[26]. Association of American Medical Colleges v. Cuomo, 928 F.2d 519 (2d Cir. 1991) (Altimari, J.).

[27]. Arica Institute, Inc. v. Palmer, Copyr. L. Rep. (CCH) ¶26,712 (S.D.N.Y. 1991); Wright v. Warner Books, Inc., 748 F. Supp. 105 (S.D.N.Y. 1990), appeal argued May 29, 1991.

The Publishing Community's Response

Why then is there still such concern? The problem is more one of perception than of reality. The language in these two cases, regardless of their legal impact, is having a chilling effect on the publishing community. On the authors' side of that community, there is a new awareness of the issue, brought into the limelight by the attention given to the Second Circuit opinions. Authors who never before knew that they were more restricted in their use of unpublished materials than of published, many of whom did not understand the uncertainty of the fair use defense and even believed that they were safe as long as they used less than 200 or 300 words, are now acutely sensitive to the risks they run--risks that were always there, but less well publicized. And much of their anxiety is owing to the reactions of the publishers, who look at the controversial language and shy away from the risk that a court may apply it over-literally. It is their fear of publishing--even after winning subsequent cases--that is keeping more primary source material from the public eye than would have reached print five years ago.

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[28]. Wright v. Warner Books, Inc., supra, 748 F. Supp. at 108-09.

[29]. Love v. Kwitney, 706 F. Supp. 1123 (S.D.N.Y. 1989).

This fear is understandable. It is difficult to invest substantial resources in a venture when there is a risk that a court may find it unlawful and enjoin you from proceeding. This risk is, however, inherent in the nature of the fair use defense as it has been applied for nearly two centuries. It is nearly impossible to predict outcomes when dealing with a flexible, equitable doctrine requiring the balancing of numerous factors. As a former practicing lawyer, I am well aware of the difficulty of advising clients on fair use claims. It is very frustrating not to be able to say, "Go ahead--you're within your rights," but instead "It depends." Every fair use claim turns on the court's assessment of all of the circumstances, and different courts interpret and weigh different factors differently. But this uncertainty existed before Salinger and New Era, and will continue to exist if the proposed amendment is passed.

Last week the Subcommittee heard testimony from representatives of the publishing community that these decisions mean that the use of a single sentence from an unpublished memorandum--anything more than one or two words--could not be fair use. These statements clearly demonstrate the overreaction that is compounding the problem here. First of all, the use of one or two words from any work, published or unpublished, could not conceivably meet the test of substantial similarity, and therefore it would not be necessary to invoke the fair use defense. Second, even the most extreme language in the Second Circuit's opinions, taken out of context and disregarding the judges' later qualifications, is more liberal than that, making clear that at least a "minimal" taking of unpublished expressive material could qualify as fair.[30]

Apart from the merits of the fair use defense, the threat of an injunction is undeniably serious. Perhaps publishers would feel less need for extreme caution if they were at least likely to get the book out into the market. Certainly this issue is critical to the magazine industry, where timeliness is essential. But the bill does not address this issue at all, dealing only with the standards for determining fair use. Nor is the omission inappropriate, since it is the traditional province of the courts to determine when the equities warrant the remedy of injunctive relief.

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[30]. Both en banc opinions in New Era, together joined by eight Second Circuit judges, would, in proper circumstances, allow copying of "small amounts of unpublished expression." See note 18 above.

In sum, the problem was initially caused by dicta rather than holdings, the courts have gone a long way toward remedying it themselves, and its current dimensions are due in large part to extreme interpretations and overcautiousness on the part of publishers.

2) Is Statutory Amendment the Answer?

Given all of this, what should be done? In my view, nothing legislatively. The courts have made a good start at resolving the problem and clarifying that unpublished works are indeed subject to a fair use defense. None has held that the unpublished nature of the work is a per se bar to fair use, and several have found fair use of unpublished works. Rather than take the issue prematurely away from the judiciary, which has historically overseen its development, it would be preferable to let the normal case-by-case process continue.

There is of course one benefit to be achieved by legislation: reassuring publishers that the law has not in fact changed since Harper & Row. Such reassurance should end their overreactions and the resulting self-censorship. But Congress does not ordinarily amend statutes simply to confirm existing law, and the precedent set by doing so here would be unfortunate. It would open the door to constant attempts to tinker with the statute to "clarify" the inherently uncertain doctrine of fair use, with the real potential of transforming it into a rigid, detailed code. Every interest group with an ongoing fair use problem would want its own individual circumstance written into the statute, whether as example, exception, or ingredient in the equitable balance. This prediction is not mere speculation; since last year's hearing, another bill has already been introduced to amend section 107 to add an additional example of fair use purposes to those listed in the first sentence.[31]

3) The Proposed Language

If the Subcommittee nevertheless decides to proceed with this title of the bill, the proposed language contains several pitfalls. The first clause essentially states the law as it was after Harper & Row and as it remains today based on the holdings in Salinger and New Era. That language, while in my opinion unnecessary, should not lead to any confusion.

The second phrase, "but shall not diminish the importance traditionally accorded to any other consideration under this section," is somewhat ambiguous. How much importance was "traditionally" accorded which other consideration, and at what point in time? And how can the unpublished nature of the work weigh against a finding of fair use without diminishing the importance of the other factors to some extent? If this language is enacted into law, it will be essential to draft clear legislative history explaining to the courts how they are to interpret the fact that the amendment was made at all (given its apparent conformity with prior law), as well as how to resolve these ambiguities.

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[31]. S. 3229, 101st Cong., 2d Sess. (Hatch). See also explanation of this bill in Senator Hatch's floor statement, CONG. REC. S16464 (October 22, 1990).

More problematic is the final phrase, stating that the unpublished nature of a work "shall not bar a finding of fair use if such finding is made upon full consideration of all the factors set forth in paragraphs (1) through (4)." For all other works, in contrast, the second sentence of section 107 allows all relevant factors to be considered, including but not limited to those four. The implication of H.R. 2372 is that fair use of unpublished works is dependent only upon the four statutory factors, and that, unlike published works, nothing else is to be considered. Contrary to the proponents' stated purpose, the net result could well be either to restrict or to expand fair use of unpublished works beyond the law in effect today.[32] For this reason, the Senate version, which refers instead to "all the above factors," is preferable. To eliminate any possible ambiguity, however, I would suggest the language "all the relevant factors," to ensure that the courts would retain their current flexibility in considering factors other than the four explicitly listed.

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[32]. Additional factors that have been considered by the courts in evaluating a fair use defense include the defendant's good or bad faith; the method by which the defendant obtained the plaintiff's work; and the privacy interest of the plaintiff. *See, e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). Since these factors more often harm than help the defendant's case, eliminating them from the balance for unpublished works is likely to lead to more findings of fair use. This would narrow--apparently unintentionally--the existing rights of authors of unpublished works.

Mr. HUGHES. I apologize for having to slip out. But, unfortunately, this time of the year we have a lot of school groups that come to the Capitol, and we wear many hats around here, so you have to slip over and say hello to the constituents. And besides that, it is a fun part of the job.

Mr. Black, last week it was—I am sorry, Mr. Waggoner has not testified. I misunderstood.

Mr. Waggoner, not only did I tell you not to summarize, I tell you not to testify.

[Laughter.]

Mr. HUGHES. Mr. Waggoner, welcome.

STATEMENT OF ROBERT C. WAGGONER, CHAIRMAN, VIDEO MONITORING SERVICES OF AMERICA, INC., NY, ON BEHALF OF THE INTERNATIONAL ASSOCIATION OF BROADCAST MONITORS

Mr. WAGGONER. Thank you very much, Mr. Chairman. I very much appreciate the opportunity to be here today, and I thank you for inviting me.

I am chairman of Video Monitoring Services of America, and I appear today on behalf of the International Association of Broadcast Monitors, of which I am a past president.

Today, we would like to bring to the committee's attention another example of the courts wrongfully interpreting the fair use doctrine in a way that threatens the broadcast news monitoring industry and the public's right of access to broadcast news programming. Mr. Chairman, this threat is every bit as serious as the danger to authors and publishers from the second circuit opinions that have spurred on the proponents of title I of H.R. 2372. However, H.R. 2372 does not address the threat to the public and to news monitors posed by some recent decisions involving broadcast news monitoring services.

Today, there are 66 broadcast news monitoring services. We watch the news 24 hours a day. We tell people, corporations and institutions, when they are on the news and what has been said about them. We make brief segments of the news available to our clients so they can respond and react. We can supply these excerpts on an overnight basis.

It no longer matters where the broadcast occurred. Viewers aren't restricted by time or place to news programming aired in their own areas. They don't have to choose among only one of several news programs being aired simultaneously. Without monitors, the public has no ready access to the news wherever and whenever broadcast. Let me remind you that in the *Sony Betamax* case the Supreme Court held that it is permissible for viewers to tape programming off the air for time shifting purposes.

Broadcast news monitoring services have greater technological resources and a national reach. We simply do for our clients what our clients are legally permitted to do for themselves. Clients of broadcast news monitoring services include the Federal, State, and local governments, corporations, law enforcement and disaster relief agencies, market researchers, political candidates, universities, and individuals. I daresay that some members of this subcommittee may have used the services of broadcast monitors to follow news coverage of their own campaigns or of their opponents.

Mr. Chairman, we are the only means by which the public can exercise its right to know what is being aired about them and where. The service we perform is important. It is critical to an exercise of our constitutional rights and to the functioning of our economy. Some broadcasters, however, have tried to put us out of business. Although most broadcasters appreciate the role we play, we are the target of cease and desist letters, threats to sue us for infringing copyrights in the news, and plenty of copyright litigation. This barrage, to be frank, has scared our members. It places our companies and the service we provide to the public in severe jeopardy.

Mr. Chairman, our story is remarkably similar to that of the authors and publishers from whom you have already heard. Following one eleventh circuit case, the *Duncan* case, several courts have now held that broadcast news monitoring is not a fair use, primarily focusing on the fact that it is a commercial activity.

The courts give short shrift to the other fair use factors. They have created a virtual presumption that because our services are commercial we can never qualify as a fair use. It is our position that under a proper analysis courts would fully consider each and all of the fair use factors. If they did, they would conclude that broadcast monitoring is just the sort of use that the fair use doctrine was designed to protect.

We generally use small segments of copyrighted news programs. The public uses our video clips or transcripts for research, criticism, comment and analysis. We do not copy or distribute entertainment programs or permit rebroadcast without the permission of the copyright owner.

We provide an important public service not offered by the broadcasters themselves. If we go out of business or our services are chilled, there is no alternative for obtaining news programming on an immediate nationwide basis. Thus, we have come to Congress to safeguard the public interest in access to broadcast news.

Our suggested legislative approach would restore the copyright balance and protect the public's access to broadcast news. We propose to amend the preamble of section 107 to include "Monitoring news reporting programming" among the list of purposes for which a use could be fair. We hope to have legislation introduced shortly this Congress in both houses.

And let me add, Mr. Chairman, that this is not idle speculation and an academic exercise, but in the last issue of Variety a report is made of the most recent case, in Atlanta, and the headline reads, "TV Monitoring Biz Dealt Blow." Typical variety language.

Mr. HUGHES. A typical headline.

Mr. WAGGONER. And, quoting the plaintiff's attorney, it could have a devastating effect on the video monitoring business. He states, "They have a major legal problem." It is more than that. We have a problem of surviving because the courts have chosen to look only at the—or almost entirely at the question of whether or not our service is, in fact, a commercial enterprise, which it has to be to survive. We believe that the matter is now in the hands of Congress because the case law has been, almost uniformly, following the first *Duncan* precedent and has determined that if a service such as ours is commercial it is essentially not fair use.

And we believe that it is incumbent upon Congress to right the balance and that we, in fact represent not a special interest, but the public interest. There is no way that the public, and I refer to the public there as corporations, government agencies, individuals, whatever, there is no way, absolutely no way that the public can find out what has been said about them on the news and where, and have the right to react and respond without the use of our service.

The networks nor the stations themselves do not provide this service, and we believe that a fair reading of the law as it was written and the history, the documents going behind this, that a fair minded person would conclude that what we do is fair use and that we are not in any way damaging the copyright owners by what we do, but we are providing a very important public service. And we hope that we can have some success in having a modification undertaken so that all of the factors that the law states as constituting fair use will be considered and that it won't stop at the first condition.

Thank you very much.

Mr. HUGHES. Thank you, Mr. Waggoner.

[The prepared statement of Mr. Waggoner follows:]

PREPARED STATEMENT OF ROBERT C. WAGGONER, CHAIRMAN, VIDEO MONITORING SERVICES OF AMERICA, INC., ON BEHALF OF THE INTERNATIONAL ASSOCIATION OF BROADCAST MONITORS

Good morning Mr. Chairman and distinguished Members of the Committee. My name is Robert Waggoner. I am Chairman of Video Monitoring Services of America, Inc., one of the largest broadcast monitoring organizations in the United States. I appear today on behalf of the International Association of Broadcast Monitors (IABM), of which I am a past president. The IABM membership includes over 50 commercial broadcast monitors from 22 states, Europe, Asia, Australia and Canada.

We appreciate the opportunity to testify today in support of Title I of H.R. 2372, which addresses one specific area in which the courts have erred in applying the fair use doctrine of the Copyright Act.[1] The IABM applauds this Committee's interest in trying to rectify such egregious judicial misapplications of the fair use doctrine. Today, we would like to bring to the Committee's attention another instance where courts have wrongfully interpreted the fair use doctrine in a way that threatens my industry, the broadcast news monitoring industry, and the public's interest in having access to broadcast news programming.

Unfortunately, passage of H.R. 2372 would do nothing to remove this threat. The bill is a commendable attempt to solve a problem arising from the use of unpublished works. Enactment of H.R. 2372, however, will not diminish the threat to the public and to news monitors posed by a few recent judicial decisions that involved broadcast news monitoring services and their use of copyrighted broadcast news programs.

Mr. Chairman, this threat is every bit as serious as the danger to authors and publishers from the Second Circuit opinions that have spurred on the proponents of Title I. We hope to have legislation introduced shortly -- similar to that introduced in the last Congress -- to mitigate the threat we now face and to restore a proper balance to the copyright law when applied to broadcast news monitoring.

Perhaps I should begin by clarifying what are broadcast news monitoring services. Broadcast news monitors track broadcast news programming and select and compile videotape segments or transcripts of news programming in which our customers have an interest. We can forward transcripts or video clips to clients on a same-day or overnight basis. Through our services, the public can be made aware of and respond to news programming of specific concern, regardless of where the broadcast occurred. By using our services, viewers are no longer restricted by time or geography to news programming aired in their own areas, or to watching only one of several news programs aired simultaneously.

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[1] 17 U.S.C. § 107 (1976).

Broadcast news monitoring is increasingly important in a world dominated by the electronic news media. Like newspapers and magazines, the broadcast news exercises enormous influence over public opinion. Unlike the print media, however, the broadcast news is ephemeral -- it is not readily available for review, analysis or response. Before the advent of the videocassette recorder ("VCR"), the public had no ability to watch news programming at a later time or in a geographically distant location.

The VCR, a remarkable technical advance, has made it possible for an individual viewer to capture and review news programming. In the Sony Betamax case, the Supreme Court held that it is permissible for viewers to tape programming off-the-air for "time-shifting" purposes.[2] Nonetheless, viewers are generally able to monitor programming only in their own communities. Broadcast news monitoring services -- with their greater technological resources and national reach -- simply do for their clients what their clients may, but usually cannot, do for themselves.

Broadcast news monitoring services are highly valued by a broad cross-section of the American public. Our clients include the federal, state and local governments, corporations, law enforcement and disaster relief agencies, market researchers, universities and individuals.

Political candidates are also major users of broadcast news monitors. They use our services to track television news coverage of their campaigns, of their opponents and to exercise their rights of equal opportunity to respond to their opposition. I dare say some members of this Subcommittee may have used the services of broadcast monitors in the midst of a political campaign.

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[2] Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

Mr. Chairman, broadcast news monitoring services advance a core First Amendment interest. They disseminate news to an interested public that would otherwise have no effective means of access to such information. They are the custodians of the public's right to know what is being aired about them, and where. Attached is a white paper that describes broadcast news monitoring services and the copyright issues that they raise in more detail.

Briefly, in the copyright law, it is the fair use doctrine that balances these First Amendment concerns against creators' exclusive rights to exploit their works. Section 107 of the 1976 Copyright Act reconciles two sets of sometimes competing interests: those of creators, who need financial incentives to produce works, and those of the public, which needs access to and wants the broadest dissemination of information. As this Subcommittee is well aware, Section 107 was carefully crafted to safeguard important creators' rights while protecting uses that further the First Amendment interest in reasonable access to copyrighted material.[3]

The preamble to Section 107 contains an illustrative list of purposes, including scholarship, criticism and comment, that are the types of purposes for which uses of copyrighted works are presumed to be fair. Section 107 then sets out four factors that courts must weigh in determining whether a particular use of copyrighted material is fair.[4] Congress intended courts to apply these factors on a case-by-case basis, giving careful consideration to each one. No one factor alone was to be dispositive.

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[3] As one commentator put it:

> [i]n the balancing between the constitutional right of access through fair use and the copyright law, the balance must tilt toward the constitutionally protected right to reasonable access. Fair use is the vehicle for effectuating this constitutional protection for the primacy of the public interest over the interest of the copyright proprietor.

H. Rosenfield, The Constitutional Dimension of "Fair Use" in Copyright Law, 50 Notre Dame L. Rev. 790 (1975).

Both in cases involving the use by authors of unpublished works and in cases where broadcast news monitors have been sued, courts have deviated from congressional intent by elevating one factor over the others to erect presumptions not found in the statute. In the case of unpublished works, the United States Court of Appeals for the Second Circuit has created a virtual presumption that the use of unpublished material is not protected by the fair use doctrine.[5] Title I of H.R. 2372 seeks to restore a proper balance to the copyright law by stating that the fact that a work is unpublished does not bar a determination that a use is fair after consideration of all four statutory factors. We support the legislation because it is a reasonable approach to correcting a judicial presumption while leaving intact the delicate balancing required by Section 107.

Mr. Chairman, our story is remarkably similar to that of the authors and publishers, although H.R. 2372 will not solve our particular problem. The news

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4. The four factors are: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (1976).

5. *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987); *New Era Publications Int'l v. Henry Hold & Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir.), *reh'g denied en banc*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990).

programming that we disseminate on a selective basis to our clients is, by and large, copyrighted material. Most broadcasters recognize that we perform a valuable service, one that they are unwilling or unable to perform. Indeed, some refer business to us or even use our services themselves.

Some broadcasters, however, do object to broadcast news monitoring. They send us cease-and-desist letters and threaten to sue us. A few have sued us and won, on the ground that we infringe their copyrights in news programming. In these suits we have relied on the fair use doctrine for protection, without much success.

We have our own counterpart to the Second Circuit's Salinger and New Era cases -- Pacific & Southern Co. v. Duncan.[6] In Duncan, the United States Court of Appeals for the Eleventh Circuit held that broadcast news monitoring is not a fair use, primarily focusing on the fact that it is a commercial activity, and giving short shrift to the other factors. The Supreme Court denied certiorari in Duncan. Several lower courts have almost unthinkingly followed and applied the Duncan holding in other cases involving broadcast news monitoring, in altogether different factual or procedural contexts. They have ignored Congress' direction to weigh all four fair use factors.[7] The result is a virtual

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[6] Pacific & Southern Co. v. Duncan, 744 F.2d 1490 (11th Cir. 1984), cert. denied, 471 U.S. 1004 (1985).

[7] See Cable News Network, Inc. v. Video Monitoring Services of America, Inc., Civ. No. 1:88-CV-2660-JOF (N.D. Ga. Jan. 9, 1990) (order denying motion to dismiss and granting motion for preliminary injunction against broadcast monitoring service and stating that "[o]n facts nearly identical to those in the present case, the Eleventh Circuit has found that defendant's copying and sales activities constitute copyright infringement"); NBC Subsidiary (KCNC-TV) v. Video Monitoring Services of America, Inc., Civ. No. 88-Z-324 (D. Colo. July 27, 1989) (bench ruling granting broadcaster's motion for summary judgment against broadcast monitoring service, stating "[i]t is very difficult to distinguish the Duncan case from this case. . . . And Duncan

(continued...)

BEST COPY AVAILABLE

presumption that, because it is "commercial," broadcast news monitoring can never be a fair use.

By focusing almost exclusively on the commercial nature of broadcast news monitoring services, the Duncan court and others have defied congressional intent. That a use is commercial is only one element of the fair use equation.[8] The House Report accompanying the 1976 Copyright Act clearly stated that the language in Section 107 referring to whether or not the purpose and character of a particular use of copyrighted material is commercial was "not intended to be interpreted as any sort of not-for-profit limitation . . . . It is an express recognition that . . . the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions."[9]

In creating a presumption against a finding of fair use based on the commercial nature of broadcast news monitoring services, Duncan and its progeny inadequately considered the public's constitutional right to receive information. These cases overlook the fact that broadcast monitors are critical to the exercise of that right. The attached paper analyzes the fair use doctrine as applied to broadcast news monitoring. Here, I will briefly discuss each of the four factors to demonstrate that

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7.(...continued)
basically on facts very similar to this says it's not a fair use."); Georgia Television Co. v. TV News Clips of Atlanta, Inc., 9 U.S.P.Q. 2d (BNA) 2049 (N.D. Ga. 1989) (court granting a preliminary injunction against a broadcast news monitoring service stating that "[o]n facts nearly identical to those in the present case, the Eleventh Circuit has found that defendants' videotaping and newsclipping services constitute copyright infringement. . . . This court is constrained by such binding precedent.").

[8] Many commercial uses of copyrighted material -- such as parody, satire, and literary criticism -- are often considered to be fair.

[9] H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 66 (1976).

enactment of the legislation that we are proposing is consistent with the language and spirit of Section 107.

The most important of the four factors is the effect of the use on the potential market for or value of the work.[10] The Supreme Court has stated that uses of copyrighted material that have no demonstrable effect on the market for or value of a copyrighted work need not be prohibited.[11] This is so because such uses do not diminish any monetary incentives for the creation of works.

Broadcast news monitoring has no adverse impact on broadcasters' incentives to create news programming because monitors do not compete with broadcasters for revenues. Broadcast news monitoring services do not rebroadcast news programming. The IABM Code of Ethics requires that our members make it clear to our clients that the rebroadcast of copyrighted news programming is a violation of the Copyright Act.

Unlike commercial broadcasters, our revenues are not tied to advertising rates or to audience size. News monitoring services do not diminish the value to advertisers of news programming. We offer an entirely different set of services -- tracking, indexing and excerpting news programs from different media, in different localities, for a post-broadcast market -- to a base of customers that may or may not have viewed the news off-air.

Moreover, broadcasters themselves do not currently service or exploit the demand for monitored, after-broadcast news programming. They have not demonstrated any interest in doing so. Most broadcasters make previously-aired programming available to the public on a casual or delayed basis, if at all. The public's interest in having consistent, complete and immediate access to broadcast news programming is not now well served by broadcasters.

In no sense, then, does broadcast monitoring have any negative effect on any potential market for broadcasters. In fact, most news monitors expand the awareness of and audience for a broadcast news program.

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[10] 17 U.S.C. § 107(4).

[11] Sony, 464 U.S. at 450.

Another statutory factor is the nature of the copyrighted work.[12] The fact that news monitors make use of news programming should weigh strongly in favor of concluding that such use is fair. The Supreme Court has held that the use of an informational rather than a creative work is more likely to be fair: "copying a news broadcast may have a stronger claim to fair use than copying a motion picture."[13] The public has a compelling interest in having access to news programming, which not only reports the news but also shapes public perceptions of newsworthy events.

In addition, the ephemeral nature of the broadcast news should be seen as supporting a determination that monitoring is a fair use. In the legislative history of the 1976 Copyright Act, it was noted that the reproduction of works that are "out of print" or otherwise unavailable for purchase through normal channels is more likely to be considered fair than the reproduction of works more readily available.[14] The same congressional purpose is served by broadcast news monitoring services, which make available information that would otherwise be unavailable for public analysis or review.

Another factor in the fair use calculus is the amount of the copyrighted work that is used.[15] This factor, too, should be seen as favoring a finding that broadcast news monitoring services act consistently with the fair use doctrine. Broadcast news monitors record news programming in order to make available to their clients brief segments from one or more broadcasts; they normally do not use entire or even large parts of news broadcasts. Generally, our clients want broadcast news monitors to sieve through news programming to identify and forward only those segments that are of particular interest to them. Broadcast news monitoring services are valuable to their clients precisely because they provide only small clips of news programming.

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[12] 17 U.S.C. § 107(2).

[13] Sony, 464 U.S. at 456 n.40.

[14] S. Rep. No. 473, 94th Cong., 2d Sess., at 64 (1976).

[15] 17 U.S.C. § 107(3).

The purpose and character of the use is yet another factor, the one on which the Duncan court placed the most weight.[16] We believe, however, that one of the strongest arguments in favor of concluding that broadcast news monitoring should be a fair use is that the purposes for which selections of monitored programs are used by our clients are those specifically enumerated in the preamble of Section 107: comment, criticism, education and research. Notwithstanding the fact that broadcast monitoring services are commercial, the purpose and character of the use made of monitored news programming is wholly consistent with the understanding of Congress in codifying the fair use doctrine in 1976.

We believe that our industry and the public's need for access to news programming should fall squarely within the scope of Section 107. Courts have ruled differently, however.

To restore proper balance to the fair use doctrine, Senator Hatch introduced S. 3229 in the last Congress. Senate Bill 3229 would have amended the preamble of Section 107 to include "news reporting monitoring" among the list of purposes for which a use is presumptively fair. We anticipate that similar legislation will be introduced shortly in both Houses.

This legislative approach would not create blanket protection for broadcast news monitoring services or exempt them from the copyright law. In cases involving broadcast news monitoring, courts would still need to weigh all four of the statutory factors. Like Title I of H.R. 2372, the proposed amendment would work to remove a judicially created presumption against a finding of fair use, would leave individual cases for the courts to resolve after a full consideration of the Section 107 factors, and would properly balance the copyright owner's right to exploit the market for broadcast news with the public's interest in having access to that news. By adding "news reporting monitoring" to the preamble, Congress would signal to the judiciary that broadcast news monitoring services are the kind of activity that promotes the First Amendment interests embedded in the fair use doctrine.

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[16] 17 U.S.C. § 107(1).

We are here today to ask that Congress intervene to move courts back to the language of, and legislative intent underlying, Section 107. In doing so, we are mindful of the Supreme Court's suggestion, in the Sony case, that Congress may well want to take "a fresh look" at the VCR technology.[17] That technology, which was in its infancy at the time that the 1976 Copyright Act was enacted, now makes it possible for the public to watch and respond to the news, wherever and whenever it may be broadcast.

As the Court recognized in Sony, use of the VCR can promote the public's interest in the broad availability of expression -- an interest now being thwarted by Duncan and other decisions. In short, just as authors and publishers ask that you enact H.R. 2372 to protect their ability to use important unpublished works, broadcast news monitors are seeking your help in enacting legislation to restore the public's right to have meaningful access to the broadcast news.

Thank you for inviting me to testify this morning. I would be pleased to answer any questions.

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[17] Sony, 464 U.S. at 456.

The Case for Saving Broadcast Monitoring: Preserving the Public's Right of Access to Broadcast Programming

INTRODUCTION AND EXECUTIVE SUMMARY

Broadcast programming, and broadcast news in particular, has unprecedented and nearly limitless influence over public opinion. News programming is, however, as ephemeral as it is powerful -- it vanishes into the ether once it is aired. Videocassette recorders ("VCRs"), which are now a part of everyday life, permit individuals to record programming for later viewing, for preservation and for analysis.

At the intersection of broadcasting and VCR technology is a new and rapidly growing industry: broadcast news monitoring services. Broadcast monitoring services meet the public's demand for tracking local and national news programs. Like newspaper clipping services, they monitor programming and edit and compile broadcast news programs -- from local stations and from across the country -- that are of specific interest to their clients.

Then, they deliver the programs or transcripts to their customers -- within hours or overnight.

Broadcast monitoring services are absolutely invaluable to the federal government, corporations, advertising agencies, charitable organizations, libraries and universities, and individual citizens. Today, such services are used to follow the reporting of issues at the local and national levels, for law enforcement, to respond to negative or inaccurate reporting, for disaster relief, to monitor commercial advertisements and for preserving and studying the news.

By using broadcast monitoring services, viewers nationwide can stay on top of news programs, wherever they may be broadcast. No longer are viewers limited by time or geography to stations in their own areas, or to watching only one of several programs aired simultaneously.

Broadcast monitoring services advance a core constitutional interest because they disseminate important information throughout the country and safeguard the public's right of access to news programming. Yet, such services are now under attack. Claiming that monitoring services infringe their copyrights in broadcast programming, a vocal and litigious minority of broadcasters are threatening -- and bringing lawsuits against -- commercial broadcast monitors. These stations seek to stifle both broadcast monitoring services and the public's ability to watch, respond to and study the news. Moreover, broadcasters may not even own the copyrights in some of the programming that they air and that is monitored!

To date, broadcast monitoring services have relied on the constitutional balance of the copyright law to protect their interests and those of the public. Although copyright is intended to reward creators, its ultimate purpose is to ensure that works are made broadly available to the public. This goal is embedded in the Constitution, in the Copyright Act and, particularly, in the fair use doctrine of the copyright law.

By preserving news programs for later viewing and by diffusing them nationally, broadcast monitoring services have demonstrated repeatedly that they advance the constitutional and statutory goals of disseminating expression. At the same time, monitoring services have not the slightest negative economic impact on broadcasters or on their incentive to produce news or other programming.

The underpinnings of the copyright law and the fair use doctrine should, therefore, protect and encourage the development of monitoring services. As the Supreme Court decided in the Sony Betamax case, copyright law clearly permits individuals and corporations to monitor and record programming off-air. Monitoring services, with their greater technological resources and national reach, simply do for their clients what the fair use doctrine would otherwise permit them to do for themselves.

In recent decisions, however, some courts have misapplied the copyright law, as it was enacted by Congress and as it has been interpreted by the Supreme Court. These decisions refuse to recognize the realities of broadcast monitoring and fail to comprehend how it serves the public. By enjoining the legitimate and necessary monitoring services that the public demands, these courts are defying congressional intent and ignoring the public's interest in being able to monitor broadcast information.

Now, only Congress can act to restore the proper balance between the public's right of access to broadcast programming and the incentives due to copyright owners. For this reason, the International Association of Broadcast Monitors ("IABM") is asking Congress to amend

Section 107 of the Copyright Act to make clear to courts that the provision of broadcast monitoring services is a fair use. The IABM was formed in 1981 and is a broad-based organization representing the community of interest in broadcast monitoring -- including fifty broadcast monitoring services in 22 states and in Europe, Asia and Canada -- as well as corporations and agencies that depend heavily on monitoring services.

When it codified the fair use doctrine in 1976, Congress stressed that courts should interpret it with great flexibility, to accommodate inevitable and rapid technological changes. Certainly, as the Supreme Court has recognized, the video revolution represents one of the most profound technological changes of this century. Yet, some of today's courts seem mired in the past, elevating the claims of only a few broadcasters over the broader interests of the public in using broadcast monitoring services. Congress should act to protect those interests and clarify the law to state that the monitoring of news programs, whether by an individual or by a service that monitors for individuals, is a fair use.

I. NATURE OF BROADCAST MONITORING SERVICES

What is Broadcast News Monitoring?

Broadcast news monitoring is watching, tracking and reviewing broadcast news programming. It is simply the exercise of the right of an individual to have access to the information broadcast over the public airwaves. Exercising that right may mean not only watching a news program as it is aired, but capturing the program on video tape for review, comment or criticism. It also means the ability to monitor news programs aired in geographically remote areas, or at times of the day or week when on-air viewing is not possible.

The activities that comprise broadcast news monitoring are so essential to maintaining a free and well-informed society that we tend to take our right to monitor for granted. It is indisputable that the public has a constitutionally protected interest in knowing the content of news programming, and that, since the Sony Betamax case, individuals have a right to tape news programming off-the-air to view at a later time. It naturally follows, then, that the public has the right to engage broadcast monitoring services to ensure that it can meaningfully exercise its constitutional and statutory interests and rights.

What Are Broadcast Monitoring Services?

Broadcast monitoring services are commercial services that provide selections of programs, compilations of programs and/or transcripts of news or public affairs programs, or commercial advertisements that are of particular interest to clients. Customers use the tapes made and sent to them by monitoring services to learn about, analyze and respond quickly and effectively to news and other relevant programming, wherever in the country it may be broadcast.

Broadcast monitoring services flourish in over twenty states and, as the demand for their services increases, are growing in number. In major cities, such as New York City, Los Angeles, Atlanta, Houston and Minneapolis, broadcast monitoring services are large businesses, some of which have their own regional offices. The largest such service has over 4,000 regular clients and employs more than 500 people. In smaller cities, such as Austin and Memphis, monitoring services are often owner-operated businesses run out of private homes.

Wherever they are located or whatever their size, broadcast monitoring services provide similar services. Clients normally place standing orders for news programs concerning specific subjects of interest, for commercial advertisements or for other programming to be monitored. Clients also may request a synopsis of news coverage of their areas of interest, from which they select the program excerpts they wish to order. Monitoring services use videocassette recorders ("VCRs") to tape local and national news programs as they are broadcast -- just like home tapers tape off-the-air to time-shift or for other purposes.

The services provided, however, go well beyond simple reproduction. Once a program is taped, the service then screens it for segments that respond to clients' requests. Where appropriate, programs from several local programs may be compiled into a single tape for the client.

Most services keep logs of how often and by which broadcaster a subject is covered. Logs identify stations that air stories or cover a particular issue, include a synopsis of the story or interview, and indicate what time and in what manner it was broadcast. Monitoring services send selections of programs, compilations or logs to their clients, usually overnight. Beyond these, they provide a wide range of other services. Some monitoring services provide daily reports on news broadcasts from which their clients select programs they want to see. Some provide only audiocassettes of news programs. Some provide typewritten transcripts. Some provide translations of programs from English into Spanish or of Spanish language programming into English. Some provide an overview of coverage in a given region or on a given day.

Contrary to some misperceptions, broadcast monitoring services never tape broadcasts for resale or for rebroadcast. Rather, by monitoring, they provide a set of useful services that adds significant value to broadcast programs. They offer these services on a timely and nationwide basis to a highly diversified audience.

The services do not rebroadcast the programming that they make available to their clients. In fact, many services tape only on lower-quality tape, which is not suitable for rebroadcast. In accordance with the IABM Code of Ethics, monitoring services are careful to ensure that the selections or compilations of programs that they provide are used only by clients for their internal research and analysis.

The IABM Code of Ethics states in part that:

1. Broadcast monitors shall record material as it is received without any alteration of the material as presented.

2. Broadcast monitors shall not knowingly assist anyone in violation of the copyright law or any other rights. Broadcast monitors shall provide to clients only those portions of broadcast reports which the client indicates he has a legitimate interest in obtaining. The clips so provided shall constitute discrete portions of the broadcast which are complete in themselves and shall identify the original broadcaster and the monitor providing the tape, and except for legends imposed thereon, shall be an accurate record of the material as broadcast.
3. Broadcast monitors shall place on each container a notice approved by the Association designed to prevent inappropriate or improper use of the material provided.

In the Sony Betamax case, the Supreme Court held that off-the-air taping for purposes of time-shifting is a legitimate use of broadcast programming that does not infringe copyright. Broadcast monitors perform a similar, but far more useful and productive, service for clients who either are unable to view a program when it is broadcast, or are geographically removed from the broadcast location.

In short, broadcast monitoring services simply do for their clients what they have the right, but neither the resources nor the technology, to do for themselves.

Broadcast Monitoring Services Provide A Valuable Public Service

Broadcast monitoring services perform important functions in our society. They safeguard the public's right to have access to reports of newsworthy events of immediate public concern, which would otherwise be unavailable to large segments of the population.

Since the advent of television, broadcast news has been a chronicle of the times, recording not only events as they occur but also shaping and reflecting how the public perceives and reacts to those events. Broadcast news programming, however, is powerful, but evanescent -- save for a few individuals who may record news programming on their own VCRs. Consequently, although the images and influence of the broadcast news are widely seen and felt, news programs are not readily or permanently available for public study.

As one commentator put it,

> [s]uppose The New York Times were available for twenty-four hours and was then withdrawn by management, never to be seen again. Scholars, and certainly television journalists, who rely heavily on print for their own information, would be incensed. Yet we are expected to accept the idea that television news has no past that it must account for, as do other media.[1]

The reasons for preserving and analyzing broadcast programming are many and varied. They include:

- review for educational and historical purposes
- research and analysis
- ensuring compliance with federal requirements regarding the right to reply and equal opportunities for candidates in political campaigns
- ensuring that advertisements and video news releases are in fact broadcast as agreed
- as a safeguard against, or to provide evidence in, libel suits.

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1. Anne Rawley-Saldich, "Access to Television," Columbia Journalism Review, November/December 1976.

Without broadcast monitoring services, none of these functions could be carried out as easily or with as much assurance. Broadcasters themselves do not provide immediate, nationwide clipping services. In fact, most broadcasters refuse to provide segments of their programming, are unable to do so, or do so only arbitrarily.

Certainly, clients of monitoring services cannot watch all broadcasts, in all relevant viewing areas, on their own. In fact, the public generally has little, if any, advance warning of when and where a particular issue will be the subject of a news broadcast. For many corporations, government departments and individuals, broadcast monitoring services are the only way of keeping track of programming of importance to them.

Who Uses Broadcast Monitoring Services?

Broadcast monitoring services serve a broad range of clients and satisfy a great variety of needs:

o **The Federal Government**

Various branches and agencies of the United States Government regularly use monitoring services, including:

-- the Federal Bureau of Investigation

-- the Central Intelligence Agency

- -- the Internal Revenue Service
- -- Congressional offices. Broadcast monitoring services assist the federal government in carrying out many essential functions, from criminal investigations to disaster relief efforts. Members of Congress use monitoring services to keep abreast of issues of importance to their constituents.

o Corporations

Corporate clients rely on monitoring services to:

- -- develop marketing strategies
- -- obtain information on domestic and foreign competitors
- -- predict the effect of larger economic developments on stock prices and investments
- -- respond to crisis situations. For example, life insurance companies used monitors to respond to the needs arising from Hurricane Hugo and the 1989 San Francisco earthquake.

- -- evaluate their performance and corporate image, as well as the effectiveness of their news releases.

o **Charitable institutions**

Charitable institutions, such as the American Cancer Society, the United Way, UNICEF, and the American Red Cross, use monitoring services to evaluate the scope and nature of community needs and to follow broadcast coverage of fundraising events.

o **State and local governments**

At the state and local level, broadcast monitoring services are used regularly by government officials, school boards, hospitals and police departments.

o **Political candidates**

Both national and local candidates for political office use broadcast monitoring services to

-- assess public opinion

- -- ensure compliance with FCC regulations
- -- keep informed about issues and current events in their communities or nationwide.

o **Universities**

Educational and research institutions are among the most important users of broadcast monitoring services. Some services donate programs of the most newsworthy events to universities and libraries for archival purposes.

Universities also use programs that are donated or purchased for research, including the study of journalism. Monitoring services are especially invaluable for educators and researchers because most broadcasters destroy their programming soon after it is broadcast.

o **Video news release companies**

Producers of video news releases, which are used by news stations across the country, need monitoring services to learn how, and in what context, their releases are used, and to assess their impact.

- **Lawyers**

Defense lawyers across the country rely heavily on broadcast monitoring services to gauge the tone and level of local coverage of their clients' cases to determine if a fair trial is possible in a location.

- **Public relations**

Public relations firms use monitoring services to evaluate their success in bringing their clients' views to the public and to identify their clients' needs.

- **Advertising agencies**

Advertising agencies rely on monitoring services to determine market trends, to see the context in which their clients' advertisements are aired, and to ensure that advertisements are broadcast in accordance with agency-broadcaster agreements.

- **Individuals**

  Individuals rely on broadcast monitoring services for access to news programming either about them or about subjects of importance to them. Of all clients, individuals are the least able to monitor news or other programs by themselves on a nationwide basis.

II. BROADCAST MONITORING SERVICES ARE PROTECTED BY THE FAIR USE DOCTRINE OF THE COPYRIGHT LAW

Broadcast monitoring services and the public they serve currently are under attack by some broadcasters. These broadcasters claim that monitoring services infringe the exclusive right, under copyright law, to authorize reproduction of their news and other programming. In their own defense, broadcast monitoring services have relied on the fair use doctrine of the Copyright Act, to prove that monitoring services, like other fair uses, is not an infringement of copyright. To date, some courts have sided with broadcasters. These decisions, however, misunderstand and misapply the fair use doctrine. When correctly applied to broadcast monitoring services, the copyright law -- and the fair use doctrine -- can and should be read to protect their services from claims of infringement.

What Is The Fair Use Doctrine?

The Constitution grants Congress the authority

> To promote the Progress of Science
> and useful Arts, by securing for
> limited Times to Authors and Inventors
> the exclusive Right to their
> respective Writings and Discoveries.[2]

Congress gave exclusive rights to authors as an incentive to create new works for the public good. These rights, however, can create a tension with other rights -- as embedded in the First Amendment -- in the broad dissemination of works of public significance.

Consequently, Congress and the courts have developed, enacted and applied the fair use doctrine to harmonize the disparate interests of the public and creators of copyrighted works. The fair use doctrine is not, therefore, merely a statutory exception to the exclusive rights afforded by the Copyright Act. Rather, it is a necessary bulwark of our constitutional scheme, protecting the public's First Amendment interests from unjustified and overreaching assertions of exclusive rights by copyright owners.[3]

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[2] United States Constitution, Art. I, Section 8.

When it enacted the Copyright Act of 1976, Congress decided that it was important to codify the long-standing common law doctrine of fair use. See 17 U.S.C. § 107. Section 107 of the Copyright Act states that certain uses of copyrighted material for important public purposes such as "criticism, comment, news reporting, teaching, . . . scholarship or research" are not infringements of copyright. Congress described Section 107 in the legislative history accompanying the Act as "one of the most important and well-established limitations on the exclusive rights of copyright owners." H.R. Rep. 1476, 94th Cong., 2d Sess., at 65 (1976).

In Section 107, and after listing examples of certain types of "fair uses," Congress set out the factors for determining whether a particular use of copyrighted material is a fair use. These are:

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[3] As one commentator put it:

> [i]n the balancing between the constitutional right of access through fair use and the copyright law, the balance must tilt toward the constitutionally protected right to reasonable access. Fair use is the vehicle for effectuating this constitutional protection for the primacy of the public interest over the interest of the copyright proprietor.

H. Rosenfield, The Constitutional Dimension of "Fair Use" in Copyright Law, 50 Notre Dame L. Rev. 790 (1975).

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

The legislative history of the Copyright Act makes clear that while "[t]he bill endorses the purpose and general scope of the judicial doctrine of fair use," there "is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change." H.R. Rep. 1476, 94th Cong., 2d Sess., at 66 (1976). Thus, Congress intended that the fair use doctrine be flexible enough to protect new technological uses of copyrighted works. VCRs were quite rare in 1976. Thus, an important, productive and beneficial purpose for using broadcast programming -- monitoring -- was not expressly enumerated by Congress when it enacted the Copyright Act. Nevertheless, broadcast monitoring services are, and should rightfully be considered to be, fair uses.

Broadcast News Monitoring Services Are A Fair Use

Broadcast news monitoring services fall within the core of activities protected by the fair use doctrine. In fact, the ultimate purposes of monitoring are precisely those defined in the first sentence of Section 107: "criticism, comment, teaching . . . scholarship or research." A searching analysis of broadcast monitoring services under the four factors set out in Section 107 demonstrates that news monitoring services are the type of activity that Congress intended the fair use doctrine to protect.

1. The Effect Upon the Potential Market for or Value of the Work

The Supreme Court has held that the sole "purpose of copyright is to create incentives for creative effort."[4] Therefore, the most important element of any fair use analysis of broadcast monitoring services is whether they diminish the incentive of broadcasters to create news programming.

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[4] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984).

Uses that have "no demonstrable effect on the market for, or the value of, the copyrighted work" need not be prohibited.[5] In such situations, no infringement need be found and no injunction need issue to protect the author's incentive to create. Because broadcast news monitoring services have no adverse economic impact on broadcast news programming, or on the incentive to produce the news, a proper application of this factor cuts strongly in favor of concluding that such services are a fair use.

Producing news programming and providing news monitoring services are not the same business. Commercial broadcasters generate revenues from the news by producing programs that attract viewers, that increase audience shares and that enable them to sell advertising at rates that escalate with the size of the audience. Broadcast monitoring services, by definition, have no impact on the size of the broadcaster's audience. Furthermore, monitors do not sell advertising time because they do not rebroadcast news segments. Therefore, monitoring services do not compete with broadcast stations for audiences or for advertising revenues. They have no actual or potential negative effect on the market for, or value of, the advertising time sold by broadcast stations.

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[5] Id.

For example, if a broadcast monitoring service in Texas provides a compilation of programs from Texas news broadcasts to a client in New York, the Texas news station has not been negatively affected in any way. The monitoring service did not cut into the Texas station's audience and did not siphon revenues that would otherwise have gone to the broadcaster. In fact, the Texas broadcaster may benefit from increased exposure to potential advertisers (who may be impressed by its news programming) who are geographically distant and temporally removed from the place and time of the broadcast itself.

Moreover, broadcasters are not, and have no demonstrable interest in, exploiting the market for monitored broadcasts programming. They do not actively sell segments of their programs in their local markets, let alone nationally. They maintain no standing orders from clients nor do they monitor or log other stations' programs. Thus, broadcast monitoring services have no impact on any potential market that broadcasters might seek to enter.

In short, broadcast monitoring services do not diminish in any way the value of or market for any broadcaster's news programming.

2. The Nature of the Copyrighted Work

The Supreme Court has held that the fair use doctrine has its broadest application where informational, rather than creative, works are involved. In fact, the Supreme Court has acknowledged that "[c]opying a news broadcast may have a stronger claim to fair use than copying a motion picture."[6] Similarly, the nature of a news program also argues in favor of finding that broadcast news monitoring services should be viewed as a fair use.

- Factual material, such as much of the material contained in a news program, is more susceptible to a fair use finding than purely artistic works, such as motion pictures.
- News is of public significance, and contributes substantially to public awareness and informed debate.

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[6] Sony, 464 U.S. at 455.

o News programs, unlike works of entertainment, lose much of their value as soon as they are broadcast. The value of news lies in its timeliness; there is no significant aftermarket for news.

o News programming is ephemeral; it becomes inaccessible immediately after it is broadcast. Congress specifically intended that the relative inaccessibility of a work to the public should be a factor in assessing whether users who reproduce such works are engaged in an activity protected by the fair use doctrine. In considering the fair use doctrine in 1976, the Senate Judiciary Committee noted that:

> [a] key, though not necessarily determinative factor in fair use is whether or not the work is available to the potential user. If the work is "out of print" and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case, but the existence of organizations licensed to provide photocopies of out-of-print works at a reasonable cost is a factor to be considered. [Emphasis supplied]

S. Rep. No. 473, 94th Cong., 2d Sess., at 64 (1976).

3. The Amount of the Copyrighted Work Used

Broadcast monitoring services record news and other programming in order to compile brief segments from various broadcasts; they do not, except in highly unusual cases, use entire -- or even substantial parts of -- news broadcasts.

Clients are not interested in the portions of news reports unrelated to them. One of the most valuable aspects of monitoring services is that they screen irrelevant information and compile only what is directly related to clients' interests. This fair use factor, then, weighs strongly in favor of broadcast monitoring.

4. The Purpose and Character of the Use

Perhaps the strongest argument in favor of finding broadcast monitoring services to be a fair use is that the purposes for which the videotapes of monitored programs are used fall squarely within the core of the doctrine: compilations and clips are used for comment, research, criticism and education. As described above, many clients use broadcast monitoring services to follow coverage about their activities, to make sure that the media fairly represents them and their views to the public. The legislative history of the Copyright Act states that:

> [w]hen a copyrighted work contains unfair, inaccurate or derogatory information concerning an individual or institution, the individual or institution may copy and reproduce such parts of the work as are necessary to permit understandable comment in the statements made in the work.

H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 73 (1976).

Broadcast monitoring services are the vehicle by which clients can perform precisely this "monitoring" or "checking" function on a nationwide basis. On their clients' behalf, and at their specific request, services, as their designated agents, copy, compile and log when they are themselves unable to view all possible programs of interest or relevance.

That monitoring services charge a fee does not mean that their services are not a fair use. The commercial nature of a use is only one aspect to be considered in analyzing the purpose and character of the use. In fact, many fair uses of copyrighted material are for commercial purposes, such as parody, satire, literary or artistic criticism, and biography.

The House Report accompanying the Copyright Act stated that the language in Section 107 referring to whether the purpose and character of the use of copyrighted material is commercial or not

> is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors . . . .

H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 66 (1976).

Broadcast monitoring services could not provide their services on a non-profit basis. They, like many other users of copyrighted material, must charge their clients. In the case of monitoring services, the fee that they charge is set at a level that demonstrates that clients are willing to -- and do -- pay for a service package that offers much more than the mere reproduction of a broadcast program.

In summary, a proper application of the four factors of Section 107 demonstrates that broadcast monitoring services are precisely the type of activity Congress wanted to protect by codifying the fair use doctrine.

o News monitoring services do not have any negative effect on the actual or potential market for or value of news programming;

- News is of significant public interest and monitoring enables clients to review and analyze otherwise ephemeral news programming;
- Monitoring services use only insubstantial portions of news programs; and
- The ultimate uses of compilations of programs are educational and for comment, analysis and research.

III. BROADCAST MONITORS AND THE PUBLIC'S ACCESS TO BROADCAST NEWS ARE UNDER ATTACK

Broadcast monitoring services play an integral role in the broad dissemination of news and other public affairs programs. Recognizing this fact, most broadcasters have excellent working relations with the broadcast monitoring services that serve their communities. Indeed, many refer viewer requests for program segments of recent broadcasts to monitoring services. In this way, broadcasters and broadcast monitoring services together ensure that the demand for both immediate news by local audiences and for archival footage by a national audience is wholly satisfied.

This system for meeting society's need to monitor and have access to broadcast information is now under attack. Some broadcasters are bringing -- and winning -- lawsuits for copyright infringement against news monitoring services. In recent years, suits have been filed in Atlanta, Los Angeles, Houston, Minneapolis, Denver, and other cities. Many of these cases have been settled; some have been lost by monitoring services ; others are on appeal. A great many more broadcasters, spurred on by the success of this increasing flood of litigation, have sent cease and desist letters, demanding that monitoring services refrain from taping their programs.

Broadcast monitoring services, facing these threats, are forced to choose between abandoning their businesses and time-consuming, expensive litigation. They believe that they are acting lawfully and that providing monitoring services, when properly understood, is a fair use of broadcasters' copyrighted material and not copyright infringement. Nevertheless, many services believe that actual or threatened litigation may compel them to leave the business.

Why are a few broadcasters meeting with such success in using lawsuits or threatening letters to drive broadcast monitors out of business? To date, and in the cases that have been decided, courts have misapplied the fair use doctrine to conclude that monitoring services are liable for copyright infringement. Instead of properly balancing the public benefits from and economic impact of monitoring against the broadcasters' incentives to create, courts have focused largely on the fact that news monitoring services are engaged in a commercial activity. They have either ignored or wrongly applied the other fair use factors.

In one of the earlier cases involving broadcast news monitoring services, for example, one appellate court leaned heavily on the fact that merely because a news monitor was a commercial business, it infringed on a potential -- the broadcast monitoring -- market for broadcasters.[7] The flaw in this reasoning is that it fails to understand the respective markets and functions of broadcasters and news monitoring services. As noted, broadcast monitoring services and broadcasters perform entirely different services. One produces and airs news for immediate consumption, the other monitors, excerpts, compiles and sends news programs to local or distant locations for later viewing. There is no actual or potential competition between the two.

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[7] *Pacific & Southern Co. v. Duncan*, 572 F. Supp. 1186 (N.D. Ga. 1983), *aff'd and rev'd in part*, 744 F.2d 1490 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

The Supreme Court has correctly interpreted the fair use doctrine to mean that courts should not "inhibit access to ideas without any countervailing benefit."[8] Because broadcast monitoring services have no real or potential negative economic impact on broadcasters, lower courts are just plain wrong: news monitoring services do not diminish the incentive to produce news or other programs. There is no countervailing benefit, economic or otherwise, from courts acting to suppress access to news.

This appellate decision and other regrettably like-minded courts have defied congressional intent regarding the proper application of the fair use doctrine. At least two other courts around the country have adopted both the factual and legal conclusions of this earlier decision. They have refused to follow Congress' instructions -- to apply the doctrine on a case-by-case basis. Courts have ignored, for example, that many owners of copyrights in monitored programs -- such as commercial advertisements or video news releases -- are not the broadcasters, and that these copyright owners freely consent to monitoring. Yet, services monitoring even these programs are threatened or subject to injunction.

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[8] Sony, 464 U.S. at 450-51.

By sharply restricting the proper scope of the fair use doctrine, courts have curtailed the activities of broadcast monitoring services. The unfortunate result is that the public's First Amendment right to access to news programs is now being severely eroded.

IV. CONGRESSIONAL ACTION IS REQUIRED TO PROTECT MONITORS AND THE PUBLIC'S RIGHT OF ACCESS TO INFORMATION

Congress should act to restore the constitutional balance of rights between the American public and broadcasters of news programs. The IABM's legislative proposal is simple and straight-forward: it makes only a minimal change in the first sentence of Section 107 of the Copyright Act to clarify that the monitoring of news programming is a purpose for which certain uses -- such as the services provided by commercial broadcast news monitors -- are fair.

The IABM's proposed amendment would add the phrase "news reporting monitoring" to the enumerated list of purposes for which a use is presumptively "fair". This list has always been regarded as illustrative, and never as exclusive. Already, a wide range of uses for such purposes as criticism, comment, news reporting, teaching, scholarship, and research are presumed to be fair uses and not infringements of copyright.

As discussed above, monitoring itself and, therefore, broadcast monitoring services make news programs available for exactly these purposes. Nevertheless, the amendment is now required to clarify Congress' intention -- that news monitoring is entitled to the same protection as other purposes that further the public interest in access to and the dissemination and use of information.

The amendment does not define "news reporting monitoring" because "news reporting" is a term that is well-understood and is already a purpose mentioned expressly in the first sentence of Section 107. "Monitoring," as noted above, is the tracking of broadcast programming, and its scope would be described more fully in legislative history.

Accompanying legislative history can also be used to describe and define the activities of broadcast monitoring services that Congress intends for courts to regard as fair uses. It would explain, for example, that just as individuals have the right to monitor, so, too, can they engage broadcast monitoring services to monitor news programming on their behalf.

The legislative history could also be used to clarify the bounds of the fair use doctrine as applied to broadcast monitoring services. For example, the reproduction and sale of entire works of entertainment programming might not be generally regarded as fair. Furthermore, the legislative history could reaffirm that ultimate decisions on the application of the fair use doctrine and the factors set out in Section 107 to particular activities of monitors are to be made by the courts on a case-by-case basis.

Both the practical and flexible nature of the fair use doctrine make it appropriate for Congress to amend Section 107 so that "news reporting monitoring" is a purpose for which the activities of broadcast news monitoring services should be regarded as fair. When Congress first codified the doctrine in 1976, it expressly recognized that fair use it should be adapted to technological developments. In particular, the House Report accompanying the 1976 Copyright Act stated "there is no disposition to freeze the doctrine in the statute, especially in a time of rapid technological change."

Since 1976, the demand for broadcast news monitoring services has grown rapidly as news reporting has become central to our lives, to our businesses and to the way we vote. Technological advances -- the VCR -- have made it possible for the public to monitor, review and respond to news programming wherever and whenever it may have been broadcast. Broadcast monitoring services are the only practical means by which individuals can exercise their rights to see and respond to geographically removed, or yesterday's, news programming.

The proposed amendment is a narrowly drawn, workable solution to the threat now being posed to the public's right to monitor news programming. It does not expand the scope of the fair use doctrine. Nor does it alter the existing structure of the Copyright Act or the balance of rights between the public and the copyright owner. By enacting the amendment, Congress will recognize that there must be some mechanism for the American public to monitor broadcast news for the American public. In this, Congress can restore the constitutional balance of rights between the public and the producers of news programming and further the purposes embedded in the copyright law.

Mr. HUGHES. Mr. Black, last week it was argued that all source code remains unpublished. Doesn't distribution of the work in object code constitute publication of the same authorship of the source code? As I understand it, computer programs are now written in a special computer language which is, nonetheless, understood by knowledgeable humans. It is called source code. The source code is converted or translated into machine-readable object code, which is not readable by humans. The object code is published and made available, but you argue that the source code is not.

I need your help in following the argument. People argue that source code is unpublished in order to enlarge the scope of protection, thereby preventing others from decompiling or reverse engineering. Or what is the basis?

Mr. BLACK. Mr. Chairman, is our view that object code is considered to be published under copyright. Source code certainly can be published and occasionally is, but as an industry practice it is not. Source code has additional significant features in it, including such things as a programmer's notes and individual interpretations or expressions of intent. That is something which has been treated as an unpublished work, and it is basically covered under trade secret law.

The question really has become, with regard to reverse engineering, whether or not the underlying ideas contained in a program can be gotten to by use of various tools. One of those tools—we have a number of tools that can be utilized, for example, memory dumps and line traces, things like that—I don't want to get into great detail here, but one of the tools used to understand the underlying ideas and principles is the mechanical code analysis method, which is also called "decompilation." But it really is simply a mechanical method of analyzing code, and it takes you back from object code toward source code.

But when you decompile object code you are not able to completely recreate the source code. A very rough analogy might be to a photograph of a three-dimensional work of art such as the painting, the Mona Lisa, in which brush strokes and depth are part of its beauty. Likewise, the source code has much greater depth to it, much more meaning in it than you will ever be able to recreate by going through the object code and trying to back up to the source code. But nevertheless, it gets you part-way there. It is, if you will, a two-dimensional image rather than a three-dimensional copy, but it is a helpful analytical tool.

Mr. HUGHES. Much like reverse engineering?

Mr. BLACK. Yes. It is actually a tool of reverse engineering. Reverse engineering in its broadest generic sense is, as you know, an analytical process to figure out the stages that got it to where it is. A mechanic, arguably, reverse engineers a car engine's operation trying to fix it. He goes through an analytical process of figuring it out.

And thus decompilation is a neutral tool. It can be misused, as anything can. But it also has many legitimate uses. It is neutral in and of itself.

Mr. HUGHES. If I walked into a computer shop, and I were knowledgeable, could I basically understand the source code?

Mr. Black. It would not be available to you in a computer shop. It is not available to the average purchaser.

Mr. Hughes. It is not available?

Mr. Black. No, not source code. Neither is object code in a human readable form. Basically, what you get is the ability to utilize the software program.

Mr. Hughes. That is the object code is what I would have available?

Mr. Black. Well, you don't actually see the object code. But yes, you get the object code utilization.

Mr. Hughes. Last week it was suggested that the purpose of greater protection for unpublished works has been a right of personal or literary privacy of the author. So long as the author did not give up that privacy by publishing, no fair use was possible.

Aren't unpublished works given added protection in order to preserve the author's right of first publication and economic exploitation, rather than a right of privacy?

Mr. Black. Certainly I think the traditional concepts when you have personal privacy do not enter in in the same way into the computer software world. But if you would look at the underlying aspects of intellectual property law in general, as your statement of last week makes clear, what we need is a balance of interests including a better understanding of what is the process of innovation.

So when we are talking in the commercial world, which is where we should be treating computer software, the real question is how do we foster the kind of innovation that is intended to result from this balance of access and protection. And we would look at our industry, hundreds of billions of dollars' worth of industry, and say that it has prospered largely because of the ability of any one company and any one programmer to look upon other products, analyze them, improve, innovate, and build.. We have really been a highly innovative industry. I don't think anyone could argue with that. And it has been because of our utilization and access to these analytical tools. Many of the processes that we are concerned about have been considered fair use, which is why we are very pleased if we can maintain the existing the law, and why we hope your amendment is not interpreted in any way to alter this creative environment. Because we think it has fostered the innovation of our industry.

Mr. Hughes. Aren't what you seek to protect basically trade secrets?

Mr. Black. Well, we would like to make sure that the law does not confuse trade secret and copyright protection. I think there are some who would like to utilize copyright law to create a super trade secret law. We think trade secret laws definitely have their place, patent law has its place, and so does copyright law. We are nervous about attempts to extend copyright law in a way which would really have it fulfill some of those other functions of protection when it does not allow the corresponding balancing of access.

Mr. Hughes. Mr. Steinhilber, in your written statement you observe that section 107 of the Copyright Act may need some legislative restructuring in addition to the amendment of title I of H.R.

2372. Does the Educators' Ad Hoc Committee have any specific recommendations at this time?

Mr. STEINHILBER. We don't have at this time, but we can give you some general ideas. We have always contended that one of the difficulties already with the section 107 is that it merges both commercial use and noncommercial use, and that causes a great deal of confusion. The second is, and somewhat related to the first, is that it makes reference to the impact upon the potential market and the discussion of a potential market isn't always a different as it relates to an educational use as compared to any other. I would say the last is, of course, the one that is already in my testimony. Is that this committee has done us, all I can say is more favors that I could ever imagine by forcing all of us in education and the commercial interests to develop guidelines. We have through the leadership of this committee developed guidelines on off-the-air taping of television programs. We have developed guidelines on print media. We have developed guidelines on music. We have developed guidelines in library usage. And I dare say we would suggest that one of the things that should be done is relook at the technology and take a look at how and what kind of guidelines should be developed with respect to technology.

Mr. HUGHES. I appreciate that suggestion. And, if the ad hoc group would like to submit any additional recommendations, the record will remain open for 10 days.

Mr. STEINHILBER. Thank you, sir.

Mr. HUGHES. You heard, I am sure, Scott Turow's argument that a fair use doctrine that is too expansive will force authors to destroy their unpublished papers in lieu of giving them to libraries. Since the American Library Association is a member of your ad hoc committee I would solicit your comments on Mr. Turow's statement. What are your views? Do you think his concern is well-founded?

Mr. STEINHILBER. I think I would like to submit a statement for the record on that because actually Eileen Cook, who is the representative of the American Library Association was here a little earlier and we were discussing it in the back, and I would like to get her viewpoints so that I am correct, if that is permissible with you, sir.

Mr. HUGHES. That will be fine.

[The information was not submitted.]

Mr. HUGHES. Professor Perlmutter, I am sure you heard my colloquy with Mr. Oman relative to our passing legislation, time and again sometimes, just to try to get the attention of the administration, whatever administration, and where we believe the courts have strayed we often pass legislation to say we really meant what we said. What is so wrong with that? You had expressed some views in your statement on that subject, and basically the bottom line for you is why legislate if it is not necessary. That is the bottom line, as I understand it. Sometimes it is necessary.

Ms. PERLMUTTER. Certainly legislation is often appropriate to reaffirm Congress's intent in enacting legislation where the courts have been misinterpreting that intent. I don't think, however, that is the case here. The courts, by and large, are construing the fair use doctrine properly, and when you look at the actual holdings as opposed to some of the language, and you look at the decisions in the second circuit since the language that concerns everyone so much, there is not a mistake in interpretation here. In fact, the problem does not exist.

I would also keep in mind that this is not a typical question of statutory interpretation. We are dealing with the fair use doctrine, which is traditionally a judge-made, flexible, equitable doctrine, and Congress expressed the intent in codifying it in 1976 to keep it that way. So the decisionmaking process may be a little bit different than it would be for the misinterpretation of a typical statute.

Mr. HUGHES. I understand.

Mr. Waggoner, you compare your situation caused by the *Duncan* decision in the eleventh circuit to the decisions affecting the publishing industry caused by a couple of cases in the second circuit. There is a difference, isn't there, however? You appear to be seeking a statutory reversal of the *Duncan* decision, whereas the publishers and authors are seeking, really, to codify *Harper & Row*. Do you agree with that analysis?

Mr. WAGGONER. Not necessarily. I think what we are looking for is a clarification of the copyright law that we think can only come from Congress. We feel that the case law has almost uniformly determined that if any of the monitor's activities are commercial that they are therefore not fair use, and we don't believe from our reading of the legislative history and the report language that that was the intent of Congress when the law was passed. And we believe that only through a clarification of the law by adding the phrase "news reporting monitoring" to those activities that would be indicated as permissible under the law such as "broadcast reporting" itself is listed, that only by clarifying this is our industry going to be able to survive.

We think it is very important that it does survive. We don't feel we are going to find redress in the courts. We think we are only going to find it in Congress through a clarification of the law.

Mr. HUGHES. Thank you.

The gentleman from California.

Mr. MOORHEAD. Thank you, Mr. Chairman.

Mr. Black, along the lines that the chairman was pursuing with you—in your opinion, will the current proposal have any impact on the leasing and marketing of computer software that is now protected by trade secret?

Mr. BLACK. Mr. Moorhead, as we have indicated, the interpretation we have given to the current proposed language is that it is a restatement of the current law and we are quite satisfied that it will not have a negative impact.

Mr. MOORHEAD. For Professor Perlmutter, I would like to ask you a question that I asked the others last week. We were told that general counsels to book and magazine publishers and broadcasters are reluctantly but almost uniformly advising clients not to use unpublished works. So, even though you may think legislation is unnecessary, don't you agree that publishing experts are acting on a strong belief that they have a problem and that this problem is having a chilling effect on what is being published?

Ms. PERLMUTTER. Yes. I do believe there is some of that going on here. I am not sure of the extent. I do note that some books, including Ms. Marton's, book, who was here testifying last week, have been published during this time, apparently without litigation. But there is a chilling effect.

I agree with Mr. Turow that it is not clear how and to what extent this amendment will resolve that problem. It seems to me that the source of the chill is, first of all, the inherently uncertain nature of the fair use defense; second of all, it is the Supreme Court's treatment of unpublished works in *Harper & Row*. The Supreme Court established a rule that it would be much more difficult to find fair use of unpublished works and the scope of the defense would be narrower in those circumstances.

Mr. MOORHEAD. Well, if there is a lack of clarity, how would you suggest taking care of that?

Ms. PERLMUTTER. I believe that the courts are taking care of it. In terms of their holdings, there has not been a problem, and later courts interpreting the language of *Salinger* and *New Era* have not interpreted it to mean what the publishers think it means. This is a situation where there is some overreaction going on, and the question for the subcommittee is whether you believe it is appropriate to amend the statute in order to reassure the publishers about their own interpretation of these cases.

Mr. MOORHEAD. Will the new legislative language in title I of H.R. 2372 regarding fair use which uses phrases such as "importance traditionally accorded" and "tends to weigh" lead to more or less litigation than we currently have?

Ms. PERLMUTTER. I don't believe it will affect the amount of litigation that is brought. I think it may add to the complexity of the litigation. Some of the language may lead to ambiguity and cause more litigation once the defense is raised. I don't believe that anyone will make a decision whether to bring a lawsuit based on this new language. It does not substantially change the amount of uncertainty involved in the fair use defense as it exists today.

Mr. MOORHEAD. What is the public interest in the renewal bill? Do we have to extend the copyright terms of thousands of copyrights in order to benefit a relatively small number of people who forgot to renew?

Ms. PERLMUTTER. I see the public interest in avoiding the forfeiture of valuable rights that have already been made available because of inadvertence, because of mistake, because of ignorance. Congress has already decided that authors should be offered a certain term of protection as an incentive to create. To allow these rights, which, in effect, were part of the bargain between authors and the public to begin with, to be given up because of mistakes and ignorance seems to me to be against the public interest.

Mr. MOORHEAD. Are there any statutory alternatives to the blanket coverage of the bill?

Ms. PERLMUTTER. It might be possible to distinguish between types of works. That is always an option. But that is not how the Copyright Act generally works in this country. We do not discriminate between types of works in granting rights, so I would not see that as being a better way to do it.

Another way to do it would be to get rid of the renewal term completely. But that is something that Congress decided not to do in 1976. Instead, it kept the two-term system for these older works that were already in their first term of copyright.

It is an interesting question. I would be happy to think further about what alternatives there might be and submit additional comments.

Mr. MOORHEAD. We would appreciate that. And I want to thank you and the rest of the panel very much for your help.

Mr. HUGHES. I just have a couple more questions. Either Professor Perlmutter or Mr. Steinhilber, we are told that computer software is considered a literary work in the copyright law. Yet our institutions of learning in this country cannot use some of the same fair use techniques to teach literature and computer programming. Is this accurate?

Mr. STEINHILBER. I think it is accurate in terms of the negotiations that take place every time we wish to discuss something on what we can and cannot do with computer software. That is the essence of the reasons I think that we need to look at the new set of guidelines.

Mr. HUGHES. You anticipate my question. I am wondering whether it would be fruitful to negotiate similar fair use guidelines basically for copying of computer software as exists for other items within our copyright law.

Professor.

Ms. PERLMUTTER. It is always helpful to have guidelines. It helps to eliminate the uncertainty in the fair use defense and makes it easier for both authors and users.

Mr. HUGHES. Professor, will the new legislative language in title I of H.R. 2372 regarding fair use which uses phrases such as "importance traditionally accorded" and "tends to weigh" lead to more or less litigation than we currently have, in your judgment?

Ms. PERLMUTTER. I think it will not cause more lawsuits to be brought. It may add to the complexity of the lawsuits that are brought. Fair use will remain an uncertain defense requiring the balancing of a number of factors.

Mr. HUGHES. Thank you. That is all I have.

We thank the panel very much for their contributions today. You have been very helpful to us.

And, as I indicated, the record will remain open for 10 days in the event you want to submit some additional material. I thank you for not reading your statements, for summarizing them today for me.

I have one statement, which I would like to offer for the record, submitted by Jane C. Ginsburg, professor of law, Columbia University.

Without objection, it will be so received.

[The prepared statement of Ms. Ginsburg follows:]

Columbia University in the City of New York | *New York, N.Y. 10027*

SCHOOL OF LAW

435 West 116th Street

Hon. William Hughes
Chair, House Judiciary Committee
Subcommittee on Intellectual Property
and Judicial Administration
2137 Rayburn House Office Building
Washington D.C. 20515

May 29, 1991

re: H.R. 2372

Dear Chairman Hughes:

I write concerning the recently proposed bill that would amend the fair use provision of the copyright act, 17 U.S.C. § 107, explicitly to include unpublished works. As a teacher and author in the copyright field, I am concerned that the bill's language may give too little weight to the non economic interests of authors of unpublished writings. Because I will be out of the country on the June 6 and 20 hearings dates for this bill, but hope my views may be of assistance to the Subcommittee, I respectfully request that this letter be made part of the record of debate on the bill.

My first recommendation is to leave § 107 unamended. As stated in a letter sent to the Subcommittee last year regarding H.R. 4263, I believe the courts, including the Second Circuit, can apply § 107 as it now stands to balance properly the various concerns (economic and personal) in unpublished works with the defendant's interest in publication.

If the Subcommittee nonetheless concludes that additional legislation in this area is necessary, I would suggest amending the language as follows:

> The fact that the work is unpublished is an important element which tends to weigh against a finding of fair use, but a finding of fair use shall not be barred if such finding is made upon full consideration of all the fair use factors.

This amendment should make clear that unpublished status is highly significant but not always dispositive, and that evaluation of the totality of factors (both statutory and judge-made) may nonetheless lead to a fair use finding.

I fear the current language of H.R. 2372 may not merely make clear that the fair use still is available, but may make the defense too easily availing, because the language tends to overlook the non economic considerations that often weigh against a finding of fair use. The bill states:

> The fact that the work is unpublished is an important element which tends to weigh against a finding of fair use, **but shall not diminish the importance traditionally accorded to any other consideration under this section**, and shall not bar a finding of fair use if such finding is made upon full consideration of all the factors set forth in paragraphs (1) through (4).

I have highlighted the troublesome language. I find this phrase problematic because in certain cases due deference to the privacy interests in the unpublished nature of the work should entail giving less importance to the economic harm factor, a factor the Supreme Court has (perhaps too hastily) proclaimed "undoubtedly the single most important element" (Harper & Row v. Nation Ents.).

Suppose that an author does not wish to publish her letters or diary. She refuses not because she wishes to enhance their market value by delaying their release, but because she genuinely wishes to keep these highly personal writings to herself. If, by the author's choice, certain of her writings are not in commerce, it may follow that no economic harm occurs from their unauthorized publication. Nonetheless, it seems clear that significant privacy interests are at stake, and that it is not "fair" to divulge the author's personal writings against her will.

A rejection of the fair use defense in these circumstances implies giving less weight to the fourth fair use -- economic harm -- factor, 17 U.S.C. § 107(4). Yet, "traditionally," (Or at least since Sony v. Universal Studios), the absence of economic harm has pushed strongly toward a finding of fair use. The bill's direction not to diminish the importance traditionally accorded other fair use considerations could constrain courts into paying less regard to the author's non economic concerns.

One might respond that the bill does not provoke such dire results, because privacy and editorial integrity issues have also furnished traditional fair use considerations. Indeed, traditionally (at common law) these considerations carried such weight that they displaced most other concerns. Hence, one might argue that it is already traditional to short-change the economic harm consideration when unpublished works are at issue. This argument, however, might lead one to the conclusion that the bill's language effects no change in the status quo. While I believe no change is in fact needed, I assume the Subcommittee wishes at least to reassure some members of the Copyright community that perceived exceesses in the Second Circuit will be checked, and that at least the appearance of change is therefore sought.

However, if, one rejects the view that "tradition" in fair use adjudication incorporates very strong protection for unpublished works, and one instead turns to a more recent "tradition" that privileges the economic harm factor, undue diminution of privacy interests could result, were the current wording of the bill to remain. Therefore, if the Subcommittee concludes that an amendment to § 107 is warranted, I would recommend modifying H.R. 2372 in the manner suggested above.

Sincerely,

Jane C. Ginsburg
Professor of Law

Mr. HUGHES. That concludes the hearing for today and the subcommittee stands adjourned.

[Whereupon, at 12:39 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

COPYRIGHT AMENDMENTS ACT OF 1991
(National Film Preservation)

WEDNESDAY, JUNE 12, 1991

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:06 a.m., in room 2226, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Mike Synar, Dan Glickman, George E. Sangmeister, Carlos J. Moorhead, Howard Coble, Hamilton Fish, Jr., F. James Sensenbrenner, Jr., and Craig T. James.

Also present: Hayden W. Gregory, counsel; Elizabeth Fine, assistant counsel; Michael J. Remington, assistant counsel; Phyllis Henderson, staff assistant; and Thomas E. Mooney, minority counsel.

Mr. HUGHES. The Subcommittee on Intellectual Property and Judicial Administration will come to order. Good morning.

Today, the subcommittee is pleased to conduct a hearing on the National Film Preservation Act of 1991, an act we hope will help to preserve America's treasured films. This subcommittee has jurisdiction over the broad area of intellectual property, which includes patents, trademarks, and copyright, as well as over issues of judicial administration, including, for example, our Nation's prisons. We often must grapple with endangered American competitiveness or the vexing problems of crime. Today, it is our pleasure to consider the preservation of films that make America proud.

"It's A Wonderful Life," "The Wizard of Oz," "Citizen Kane," and "Mr. Smith Goes to Washington" among others have been a long and cherished part of our cultural heritage. Today, these films are on the National Film Registry and will be preserved for future generations. However, more than half of the feature films made in this country before 1951 have literally vanished and many more recent films are deteriorating quickly.

Congress first enacted the Film Preservation Act in 1988, under the sponsorship of Representative Bob Mrazek of New York, after achieving a compromise between proponents and opponents of moral rights for filmmakers. The act created a National Film Preservation Board to assist the Librarian of Congress in the selection of films that have particular cultural, historic, or aesthetic significance. Under the law, the Librarian selects up to 25 films each year for placement on a national registry. The Librarian then obtains an archival copy of each film on the registry and places it in a special collection in the Library of Congress. The Librarian has already named 50 films to the registry and the Board will meet tomorrow to recommend an additional 25 films.

The National Film Preservation Act, contained in title III of the Copyright Amendments Act of 1991, would assure that the Library of Congress and the National Film Preservation Board can continue the preservation and restoration of America films for 6 more years.

The proposed legislation would advance the goals of the 1988 act: The promotion of film as an art form and the increased public awareness of the need to preserve our Nation's motion pictures. However, the proposal, as recommended by the Library of Congress, would place a new emphasis on film preservation. Conversely, it would not require the Librarian or the National Film Preservation Board to resolve the more intractable questions of labeling and moral rights that were contained in the original 1988 legislation.

I would like to commend the Librarian and the National Film Preservation Board for their superb work implementing the National Film Preservation Act. The act was born in controversy. Yet, today the Board and representatives from throughout the film industry stand virtually united in support of the proposed reauthorization as well as the Librarian and the Board's efforts to promote film preservation. At least I think that is the case.

I understand there are strong supporters and opponents of moral rights and film labeling in the film community and the American public. While these issues are not the subject of today's hearing, we will consider the important questions of the rights of filmmakers in a separate hearing. It is my hope that we can promptly pass the proposed legislation to assure the uninterrupted preservation of our many valued films.

Does the gentleman from Oklahoma have an opening statement?

Mr. SYNAR. Yes, Mr. Chairman.

Mr. HUGHES. The gentleman is recognized.

Mr. SYNAR. Thank you, Mr. Chairman. First, I am pleased that the Film Preservation Act has fulfilled its primary goal of preserving a variety of films that reflect this country's cultural, artistic, and significant works since the development of motion pictures. I am also pleased that this subcommittee today has a chance this time around to fully consider the act and its provisions. Now, the act clearly impacts the copyright community and should be considered in that light.

Just as old and aging books are preserved and protected by the Library of Congress, copyrighted film works also deserve that protection and preservation for future generations. And, while I appreciate the increased private efforts in film preservation, I believe it is essential to maintain a government role in the film preservation, just as paintings are preserved by our national museums.

Given the controversy that has accompanied the passage of this act, I would like to commend Dr. Billington for his excellent administration and his approach to this labeling issue and its requirements. I agree that the Librarian of Congress should not be in the position of administrating provisions which are not only subject to differing interpretations but are also better left up to private parties. And the chairman I think is correct in moving this bill without the labeling requirement.

Having been actively involved in this hearing process since the last Congress on the issue of moral rights—in this subcommittee—I believe there has been opportunity for all parties to state their case. And if, as you have stated, Mr. Chairman, there may be additional hearings, I would like to be convinced that drastic changes need to be taking place, that have changed since last year, in order to justify a new position on my part on the issue of moral rights. If you decide to do that, I look forward to those hearings.

I appreciate what we are doing here today, and I think they are very timely.

Mr. HUGHES. Thank the gentleman. The gentleman from Illinois.

Mr. SANGMEISTER. No opening statement, Mr. Chairman.

Mr. HUGHES. I thank the gentleman.

I would like to introduce our first panel of distinguished witnesses this morning, the Librarian of Congress, Dr. James Billington, and Mrs. Fay Kanin, the Chairperson of the National Film Preservation Board. You may come forward, please, if you would at this time.

Dr. Billington has served as the Librarian of Congress since 1987. He is himself a renowned author and historian, as well as an educator and proven administrator. He is accompanied today by Eric Schwartz of the Copyright Office, who has worked with the Librarian on the implementation of the National Film Preservation Act.

Fay Kanin is an award-winning writer and producer of film and theatrical works for screen, stage, and television. She is past president of the Academy of Motion Picture Arts and Sciences, and is currently serving as its secretary and representative on the National Film Preservation Board. The Board is fortunate to have in its chairperson a woman of enormous talent who commands respect throughout the film industry and the country.

Mrs. Kanin, we very much appreciate your service on the Board and your testimony here today.

Both your statements will be made a part of the record in full. We hope you can summarize for us, so we can go right to questions.

Dr. Billington, welcome.

STATEMENT OF JAMES BILLINGTON, PH.D., THE LIBRARIAN OF CONGRESS, ACCOMPANIED BY ERIC SCHWARTZ, POLICY PLANNING ADVISER TO THE REGISTER OF COPYRIGHTS, AND COUNSEL, NATIONAL FILM PRESERVATION BOARD, AND DR. PAT LOUGHNEY, CURATOR OF FILM PROGRAMS

Dr. BILLINGTON. Thank you, Mr. Chairman, and members of the subcommittee. I appreciate the opportunity to appear here today to speak to the reauthorization of the National Film Preservation Act. I am accompanied by Mrs. Kanin, who as you indicated, represents the Academy of Motion Picture Arts and Sciences as well as serving as chairman of the National Film Preservation Board, and Eric Schwartz, to my right, Policy Planning Adviser to the Register of Copyrights and counsel to the Board.

And I would like to begin by especially thanking Mrs. Kanin for all of her contributions during the past 2½ year. She has steered the Board successfully through some difficult decisions, specifically the labeling guidelines, due to a large extent to the trust that the Board has in her and to her impartial and excellent judgment.

We also appreciate this subcommittee's support of the reauthorization of the National Film Preservation Act of 1988, as provided for in title III of the Copyright Amendment Act, H.R. 2372. This reauthorization will enable the Library of Congress and the Board to focus our efforts on film preservation for an additional 6 years.

When Congress enacted the National Film Preservation Act of 1988, Mr. Chairman, the Library was selected to administer the act. The Library of Congress is the repository of the largest film and television collection in the world, and therefore I think, the National Film Registry collection is appropriately housed in the Congress' Library. And I think Congress deserves real gratitude from the Nation and from the broader creative community everywhere for supporting the preservation of the Nation's film legacy. We at the Library are very grateful for the opportunity to administer this act these past 2½ years.

Now, since the enactment of the 1988 act, we have worked closely with the National Film Preservation Board, soliciting members' views, on all of our formal and informal policy decisions. The reauthorization bill before you represents the Board's best thinking of what course the National Film Preservation Act should take.

Congress mandated the Board to achieve two goals: To promote film as an art form and to increase the public awareness of the need to preserve motion pictures. The selection of the first 50 films has generated a considerable amount of public attention in these important areas. It has increased recognition of film as an American art form, if you can judge from the reactions we have received from the public, film critics, and the popular press in nominating films and in reporting on the film titles selected.

Motion pictures represent an art form that has been specially developed and promoted in the United States. We have encouraged public nominations and debate on the titles selected, thereby increasing the public's awareness of the outstanding films that America has created as well as encouraging scholarly debates on the importance of our cultural film heritage.

The film selections have also focused attention on the importance of film preservation. As the chairman indicated, more than one-half of all the films produced before 1951 have been lost forever, including 80 percent of all silent films. There are at least 200 million feet of nitrate film in film archives that have still not been preserved and an additional, perhaps almost equal if not fully known amount, of deteriorating film still in private American hands. This sobering situation gave rise to the original bill and is fully represented in the findings of your bill for reauthorization.

Now, the problem of preservation has many facets—e.g. the disintegration of older nitrate-based films created before 1951, and the fading of color prints produced as recently as a decade ago. We need to work actively to save films; right now our preservation efforts cannot keep up with the deterioration of the remaining collections of which we are aware. Every day we lose part of our American film heritage. Clearly, more attention must be focused on the importance of preserving and restoring the remaining films which are threatened by extinction because of their fragile state.

The selection of film titles every year that are themselves in need of preservation assures that these key national treasures will be available to generations to come. The films selected by me for the National Film Registry are solicited as gifts for preservation in a special collection in the Library of Congress' film collection. After each of the films has been selected, Library motion picture preservation experts begin the detective work necessary to find the best surviving materials for each film title. We have been encouraged by the generosity of film owners in supplying us with archival quality materials for the films chosen so far.

The removal of the controversial film labeling guidelines from our projected future activities will allow us to concentrate on film preservation, something that a newly reauthorized Film Preservation Board will be uniquely qualified to carry out. Let me briefly explain why.

Film preservation is accomplished in this country by many large and small archives, private and public, in order to preserve the national film heritage, which is, after all, America's collective memory on film, and much of our collective memory of this century, in particular.

The Library of Congress, with the support of Congress, is responsible for about one-half of film preservation efforts in this country. The Board has already proved itself as a unique body whose distinguished members can work in cooperation with the other major archives to bring both public and private sector activities into a coordinated focus on this massive problem of preservation.

The Library of Congress, in concert with the National Film Preservation Board, is able to communicate directly to Congress on film preservation activities currently underway and on the future requirements necessary to salvage our American film heritage. This can help strengthen the existing activities of all film archives in the United States.

H.R. 2372, as introduced, calls for a comprehensive study of the Nation's current film preservation activities as well as a look at other important issues, such as the dissemination of films for use in education. The bill, if enacted, will continue the activities of the Board through September 1997, allowing the Library of Congress and the Board to focus on film preservation while continuing the stress on film as an American art form by selecting and collecting films that are culturally, historically, and aesthetically significant.

The legislation also authorizes a more broadly representative Board by adding important film constituencies—a cinematographer, a representative of theater owners, a film archivist, and one at-large member. The legislation deletes the current requirement that the films be feature length and have been theatrically released. This will allow us to select significant films which may be less commercial in nature though we believe equally deserving of preservation and public note.

Films selected for the National Film Registry could carry a seal of the Library of Congress on those film copies that are the original and complete copies, and that have been preserved by the Library or by another archive adhering to the Library's standards. The seal would be authorized by the Library, but it could also be affixed by another qualifying film archive or by the copyright owner on a voluntary basis.

In order to exhibit or distribute any film under copyright protection, however, only the copyright owner or a licensee could grant permission in accordance with Federal copyright law. The current labeling requirement for colorized or materially altered films would no longer apply to the films in the National Film Registry.

H.R. 2372, as introduced, is supported by the Library and by the Copyright Office, as the Register, Ralph Oman, testified last week before your subcommittee. We believe that the difficult issues of labeling and moral rights should be given separate attention by Congress, as I gather they will be considered in separate hearings, as the chairman indicated.

The Copyright Office is ready to provide whatever assistance you need on this important issue to follow up on the year-long study it completed in 1989 for this subcommittee on moral rights in the motion picture industry. Any reauthorization of the National Film Preservation Act that includes moral rights or labeling would be troubling to me if it continues to require that the Library of Congress enforce these provisions in any watchdog function. It is not useful for the Library to use its resources to try to perfect or administer a labeling system. This seems inappropriate for the Nation's Library. The Library which should be charged with securing original copies of important films against which others can judge alterations, preserving them and promoting them as an American art form.

If Congress decides to create a labeling system, individual parties, such as the creative artists who have rights in the system, should be charged with protecting and enforcing those rights in the courts.

Finally, I would note that labeling films that are altered does not protect or preserve the original film material. Only film preservation activities can do this.

I appreciate very much the consideration given by this subcommittee to this issue. I am confident that, if enacted, H.R. 2372 will allow the Film Board to focus on the enrichment of America's film heritage with the full support of the organizations currently on the Board and the very effective leadership that Mrs. Kanin has already given it.

We will be very happy to answer any questions you might have, Mr. Chairman.

Mr. SYNAR [presiding]. Thank you, Dr. Billington.

[The prepared statement of Dr. Billington follows:]

STATEMENT OF JAMES H. BILLINGTON
LIBRARIAN OF CONGRESS

Subcommittee on Intellectual Property and
Judicial Administration
Committee on the Judiciary
U.S. House of Representatives

June 12, 1991

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to appear here today to speak to the reauthorization of the National Film Preservation Act.

In 1988, Congress enacted the National Film Preservation Act of 1988 (Pub.L. 100-446) as an amendment to the Department of Interior and Related Agencies Appropriations Act, FY 1989. The Library of Congress was selected by Congress to administer the Act. The provisions of the National Film Preservation Act expire on September 27, 1991, unless reauthorized by Congress.

The Library of Congress, as the repository of the largest film and television collection in the world, is very grateful to Congress for allowing us the opportunity to administer this Act these past two and half years. The Library has worked closely with the National Film Preservation Board, soliciting their views in all of our formal and informal decision-making in order to represent effectively the consensus of the Board, wherever possible. Over the course of the last year, my colleagues and I have participated actively in the Board's deliberations on its future and on a reauthorization of the National Film Preservation Act, which is now contained in Title III of H.R. 2372.

The Board has attempted to achieve dual goals -- to promote film as an art form and to increase the public awareness of the need to preserve motion pictures. The Library of Congress itself does over one-half of the film preservation of this nation. Our collections are unequaled. The Library of Congress is able to set an example in film preservation and to give national leadership. A reauthorization of the Act, with a focus on preservation, will allow the Board and the Library to work towards the coordination of activities in both the private and public sectors in ways that will make significant improvements in our efforts and those of other large and small archives in this country. Members of the Board can provide further leadership with their own constituency, in developing a national film preservation plan.

The National Film Preservation Act of 1988 -- Background

The National Film Preservation Act of 1988 established a 13-member National Film Preservation Board within the Library of Congress. In accordance with the provisions of the Act, I appointed one member from each of the organizations that submitted nominations to me. The National Film Preservation Board held its first meeting on January 23, 1989, in the Library of Congress. I appointed Fay Kanin, representing the Academy of Motion Picture Arts and Sciences, as the Chair of the Board.

The Board's primary activity each year has been the selection of twenty-five films for inclusion in the National Film

Registry. Films are eligible for selection if they are over 10 years old and are of cultural, historical, or aesthetic significance. In accordance with the mandate of the Act, and with advice from the Board, I established guidelines and criteria for the selection of films for the National Film Registry. These guidelines were first submitted to the Board and then to the public for comments and were published in the Federal Register (55 Fed Reg 32566, August 9, 1990).

The films selected are placed in the National Film Registry in the Library of Congress. To date, 50 films have been selected for inclusion in the National Film Registry. The Board will meet tomorrow to discuss the 1991 nominations. I will announce our final selections in September.

The selection of the first 50 film titles has generated a considerable amount of public attention in two important areas. First, it has increased recognition of film as an American art form. The reaction from the public, film critics and the popular press has been enormously encouraging. We have opened a floodgate of debate with the selection of each film title, thereby increasing the film literacy of the public and stimulating scholarly debates on the importance of cultural film heritage to American history.

Second, the film selections have focused attention on the importance of film preservation. Over one-half of the films produced before 1951 have been lost forever, including 80 percent of the silent films. These important and sobering statistics are represented in the findings of your bill.

The preservation problem has multiple facets -- e.g. the disintegration of older nitrate-based films, created before 1951; and the fading of color even from prints made a decade ago. We need to work actively to save films; right now we are barely treading water in order to save the remaining collections of which we are aware. Every day we lose more films. Clearly more attention must be focused on the importance of preserving and restoring the remaining films which are threatened by extinction because of their fragile state. The selection of film titles every year, many in need of preservation, assures that these, at least, will be available to generations to come.

The films selected by me for the National Film Registry are solicited as gifts for preservation in a special collection in the Library's film collection. After each of the films has been selected, Library motion picture preservation experts begin the detective work necessary to find the best surviving materials for each film title. We have been encouraged by the generosity of film owners in supplying us with archival quality materials for the films selected. We have not always been able to get "pre-print materials" because these are enormously expensive. However, film owners have donated copies of archival quality prints and in many cases they have made new prints for us. The Library is especially grateful to the Motion Picture Association of America and it members, and to the various small collectors and copyright owners who have worked with us to enable us to obtain copies of each of the films. It is for this reason that I believe we should limit the number of films selected each year to a reasonable number. Although public policy might suggest the need to increase the number of films chosen for the National Film Registry, our ability to obtain copies by gift will diminish if we raise the ceiling too high.

In addition to selecting and collecting copies of films, the present Act requires me to administer a controversial film labeling system. All copies of selected films that are colorized or otherwise materially altered, must be labeled in accordance with section 4 of the Act. Films so selected for inclusion in the Film Registry may carry a seal of the Library of Congress only if they are not colorized or materially altered. The bill provides enforcement provisions to prevent misuse of the seal and to ensure proper labeling when required.

Although opposed by copyright owners, the Act has worked fairly well for the labeling of colorized films, and there has been no disagreement about the application of the label in these cases. However, the labeling requirements with regard to material alterations other than colorization have generated a great deal of disagreement in Congress, in the industry, and among the Board members.

The disagreement has focused primarily on the interpretation of congressional intent over the definition of "material alteration" contained in section 11 of the Act. Some argue that this term should be read broadly to require labeling of Registry films in all cases where a film is altered for the purposes of distribution for television or for videocassettes.

Others argue that the language in the definition was meant to exempt most current practices from the labeling requirements because they are considered the "reasonable requirements" of distributing a work. I was charged with issuing final labeling guidelines, but this task was quite difficult because of the paucity of legislative history.

In November 1989, after communicating with film owners, distributors, broadcasters and creative artists, I proposed film labeling guidelines and published them in the Federal Register (54 Fed Reg 49310, November 30, 1990). The proposed guidelines elicited eleven public comments. In response to the comments, I made some changes and issued final labeling guidelines (published in 55 Fed Reg 32567, August 9, 1990).

The published guidelines went into effect on September 24, 1990, for the first 25 films and on February 7, 1991, for the second 25 films (55 Fed Reg 52844, December 24, 1990). The guidelines are to be used by film owners, distributors, exhibitors, and broadcasters in determining when a version of one of the films selected for inclusion in the National Film Registry, which is in their possession, has been colorized or otherwise materially altered and therefore must carry the required label.

Moreover, these regulations are to be used for placement on a designated film of the seal of the National Film Registry.

The guidelines expire when the Act expires in September 1991. We have administered these labeling guidelines as fairly as possible. The Library should not, however, be put in a position in the future to continue administering these or other labeling guidelines. If Congress mandates the labeling of films, I believe that it would be more appropriate to leave the enforcement of labeling or moral rights to the individual parties and the courts rather than an agency of the federal government.

Reauthorization of the National Film Preservation Act

I would like to continue the work of the Board in the areas where we have reached common ground and which furthers the Library's mission -- film preservation. It is my view that any reauthorization should separate the issues of the physical preservation of film from the moral rights and labeling issues. These latter issues would require extensive study by this subcommittee should you decide to consider these important issues. We have learned some valuable lessons during the past two and half years about the difficulties of creating and enforcing a labeling system -- and such a system needs further attention by the committees whose jurisdiction includes copyright matters. Any such consideration could begin with the Copyright Office's 1989 study on moral rights in the motion picture industry conducted for this subcommittee.

Before you consider any film labeling system, you should carefully balance the rights of copyright owners to freely disseminate their works, against the rights of the creative artists who feel harmed by the dissemination of works that have been altered without their consent. There are really two approaches to a film labeling system. One type of system would require the labeling of films in order to educate the public and inform consumers on changes made during the transfer of films to different mediums for viewing. The other system would establish rights in individual creative artists under a moral rights regime in order to prevent potential harm to the reputations of certain creators of films. The two systems have different goals; those goals should be carefully defined before any labeling system is created. In addition, any system must contain clear definitions as to what alterations fall under the labeling system -- this lack of clarity was the major difficulty I encountered in administering the current labeling system. Finally, there is some question whether any system which requires the labeling of copies of films, including videotape copies, will act to protect the preservation of films. It is for these reasons that the Library of Congress and the Board suggest a separation of these issues. The physical preservation of films for cultural and historic purposes is a most desirable goal and one we should actively pursue.

I believe that H.R. 2372 will help consolidate the nation's preservation efforts and will provide the forum to develop a national film preservation plan in conjunction with the other major film archives, including the private and public sector. There is much to be done just to preserve and restore our national film heritage. This can be accomplished with a reauthorized and refocused National Film Preservation Board as provided for in H.R. 2372.

H.R. 2372, as introduced would continue the activities of the Library and the Board through September 1997. Under the provisions of the bill, the main focus of the Act would shift to the development of a comprehensive national film preservation program. The Library and the Board, in conjunction with the other major film archives, would focus on the coordination of national film preservation efforts -- assuring that public and private sector activities are complementary. Moreover, the Board can generate public awareness of and support for these activities.

Four new members would be added to the existing 13-member Board -- a cinematographer, a representative of the theater owners, a film archivist, and an at-large member. The Librarian of Congress, in consultation with the Board, would continue to select films for the National Film Registry. One copy of each film selected would be preserved "in archival quality" by the Library of Congress for the National Film Registry Collection.

Films would continue to be selected on the basis of their historical, cultural and aesthetic importance, keeping the requirement that the film be at least 10 years old, but dropping the requirement that the film be feature length and have had a theatrical release in order to be included. This will allow us to select more films that are culturally, historically, and aesthetically significant, but which were less commercial in nature but equally deserving of preservation, e.g. shorts, cartoons, documentaries, etc.

Films selected for the National Film Registry could carry a seal of the Library of Congress on those film copies that are the original and complete copies and that have been preserved by the Library or by another archive adhering to the Library's preservation standards. The seal would be voluntarily affixed by the Library, another qualifying film archive or the copyright owner. However, in order to exhibit or distribute any film under copyright protection, only the copyright owner or a licensee could grant permission in accordance with federal copyright law.

The current labeling requirements, for colorized or materially altered films, would no longer apply to films in the National Film Registry. The Library and the Board would conduct a major study for Congress on the current status of film preservation activities in the United States, in conjunction with other film archives. We would also look at issues dealing with the dissemination of older audiovisual works -- some still in their term of copyright protection, and others in the public domain.

H.R. 2372, as introduced is fully supported by the Library of Congress and by the Copyright Office, as Ralph Oman testified last week before your subcommittee.

We believe that the difficult issues of labeling and moral rights, if you wish to consider them, should be given separate attention by Congress. The Copyright Office is ready to provide whatever assistance you need on this important issue to follow-up on the year-long study it completed in 1989 for this subcommittee on moral rights in the motion picture industry.

Any reauthorization of the National Film Preservation Act that includes moral rights or labeling would be especially troubling to me if it continues to require that the Library of Congress enforce these provisions in any watchdog function. It is not useful for the Library of Congress to use its resources to try to perfect or administer a labeling system. That is not appropriate for the nation's library. The Library should be charged with securing original copies of important films against which others can judge alterations, preserving films, and promoting film as an American art form. If Congress decides to create a labeling system, individual parties, such as the creative artists who have rights in the system, should be charged with protecting and enforcing those rights in the courts.

I appreciate the consideration given to this issue by this subcommittee. I am confident that if enacted, H.R. 2372 will allow the Film Board to focus on the enrichment of America's film heritage with the full support of the organizations currently on the Board.

I look forward to working with this subcommittee on this legislation to assure that we develop a comprehensive film preservation plan to protect our national film heritage.

Mr. SYNAR. Ms. Kanin.

STATEMENT OF FAY KANIN, CHAIRPERSON, NATIONAL FILM PRESERVATION BOARD, AND SECRETARY AND PAST PRESIDENT, ACADEMY OF MOTION PICTURE ARTS AND SCIENCES, SANTA MONICA, CA

Mrs. KANIN. Yes. Mr. Synar, and members of the subcommittee, as has been noted, I am Fay Kanin, Chair of the National Film Preservation Board. As a Board member, I represent the Academy of Motion Picture Arts of Sciences, having served as its president for 4 years.

I thank Chairman Hughes and all of you for the opportunity to appear at this hearing to voice my support for your efforts and for the bill that you and your colleague, Mr. Moorhead, have introduced to reauthorize the National Film Preservation Act of 1988 for an additional 6 years.

As a screenwriter and a member of the film community, I must express the pride that I and many of my colleagues felt in 1988 when our Government officially recognized motion pictures as "an indigenous and significant American art form and an enduring part of our Nation's historical and cultural heritage."

Dr. Billington has already testified to the Library's views on the proposed legislation and the improvements that it would make over the current law. Though the Board itself is a diverse group representing many shades of opinion, the area of common ground in which we all share equal concern, film preservation is the one that you have addressed in the reauthorization bill.

In the time that it has been my privilege to serve as chair, one of the signal pleasures has been to work with the eminent and erudite gentleman with whom I share this table, at my right here. My function today is to acquaint you with some of the activities and the accomplishments that have resulted from the passage of this landmark act, but I am sure that the least known but arguably most significant is that it has succeeded in turning Dr. James Billington into a certified and passionate film buff.

All of us on the Board have come to that Elysian state out of our professional involvement in motion pictures, but Dr. Billington has arrived there by way of a 2½-year journey with us through literally thousands of films proposed, reviewed, discussed, and nominated, with 50 finally chosen for inclusion in the prestigious National Film Registry. And I think it is safe to say that he is as staunch an activist as any of us in the formidable task of preserving the Nation's film heritage.

All art forms are buffeted by time, but ours has proved unexpectedly ephemeral. Museums show us sculpture from 15,000 years ago and beautifully preserved books and paintings from before the 15th century. But, as the chairman has stated earlier, half—50 percent—of all the 21,000 feature films made in this country before 1950 have been lost to us. We preserve and treasure great works of art, music, dance, opera, though only a relatively small percentage of the population is exposed to any of them. But hundreds of millions of people the world over know and love our movies, have been entertained by them, have grown up; with them from childhood, been informed, even inspired, by them, and welcomed them as an integral part of their lives. Motion pictures are truly the people's art form. So it is eminently fitting that the Congress, custodians of the public interest, recognize and address the current preservation crisis.

The Nation's film archives have done a valiant job with some support from the Government, the film community, and private donations. But that mind-boggling 50 percent statistic shocks us into the realization of how much more has to be done if we are to beat the clock and transfer millions of feet of crumbling nitrate to safety stock, as well as deal with fading color and the other erosions of time.

To better assess the needs of the future, just let me take a moment to give you a brief review of the past. The 1988 law charged the National Film Preservation Board to advise and assist the Librarian of Congress in five important areas: First, to select 25 films each year for inclusion into the Registry; second, to establish criteria for that selection; third, to set up procedures which would engage the general public in the process; fourth, to secure archival copies of the selected films to be lodged in a special collection at the Library of Congress; and finally, to issue labeling guidelines for those films.

At our earliest meetings, we addressed those necessities and developed a set of procedures and criteria to use in choosing our first 25 films. Again, the act established certain requirements—that the films be chosen on the basis of their historical, cultural and aesthetic importance; that a film be at least 10 years old, be feature length and have had a theatrical release. Our decision was to interpret the act's criteria broadly in order to allow as many films as possible to be eligible for consideration. For example, we read the requirement "feature length" as varying with individual films according to the meaning of the term in the period when that particular film was made.

Since the involvement of the public was one of our prime concerns, we established a timetable and procedures that would allow for maximum public participation in the nominating process. Our efforts were abundantly rewarded by the response; almost a thousand film titles were sent in for nomination from States all over the Nation. The Board winnowed through these, as well as choice of its own, eventually coming up with 50 recommendations. In the lively discussion that ensued, each member contributed his or her particular knowledge and expertise. In the process, I think we helped the Librarian to make an informed choice of the final 25. The list was announced in September 1989, and received a degree of coverage in the Nation's press, radio, and television that exceeded even our most optimistic projection.

In 1990, the selection process followed much the same pattern, with even more diversified nominations invited from many specialized film scholars and historians. An increase in the public's nominations—over 50 percent more than in the previous year—was a gratifying confirmation of the success of the program.

The selection of films, however, is just one component of the Board's work. Immediately after the announcement of each year's films, the Librarian and his staff begin the sometimes difficult task of contacting the copyright owners in order to obtain archival-quality copies of each film. In many instances, members of the Board have used their not inconsiderable clout to persuade a reluctant owner to place these valuable materials at the Library for safekeeping. As a case in point, I was able to speak with Susan Lloyd Hayes, the granddaughter of Harold Lloyd, who controls his foundation and his films, and put her together with Eric Schwartz at the Library Copyright Office, the result being that she has agreed to strike a new archival print of "The Freshman" at the foundation's expense and contribute it to our preservation drive.

Of the first 25 films selected, the Librarian informs me that we have been promised or already have in hand prints of all but one of the films, and that one is in the works. And we are well on our way to the same remarkable success ratio on the 1990 selections.

The one area in which there are sharply conflicting divisions among the Board has been on the labeling requirements under the 1988 act. It is the recognition of this that had led the Librarian to urge the separation of the labeling issue from that of film preservation in the proposed legislation, convinced, I am sure, that pursuing them in tandem will not successfully serve either cause.

The National Film Preservation Board, reconstituted and reauthorized, seems eminently well-suited to address the crisis in film preservation and to engage the public's attention. Not only can its broad representation in the film world afford it access to all aspects of the problem, and hopefully to some of the solutions, but equally important, its annual selection of significant films opens the door to continued widespread national publicity and discussion, and perhaps to sources of funding so far untapped. We hope so.

In the end, the preservation of our film heritage must be a concerned and carting partnership among moviemakers, archivists, historians, educators, statesmen, and, most important, moviegoers, who may ultimately be given the opportunity to actively contribute to the cause of saving our movies.

At a recent film festival, I had occasion to meet Astronaut Buzz Aldrin, one of the first men to set foot on the moon. We had just attended a screening of the 1927 movie "Wings," the first film to celebrate aviation and winner of the first Academy Award. In a print responsibly preserved by Paramount Pictures, "Wings" still had the power to thrill and audience and move it to tears. "What better way to know where we're going than to see where we've been," Buzz Aldrin said.

For me, that says it all.

I wish to thank you, Mr. Synar—Mr. Chairman—for your introduction of H.R. 2372 and for its consideration by this subcommittee. And I am prepared to answer some questions if you have them.

Mr. SYNAR. Thank you, Mrs. Kanin. We do appreciate it.

Dr. Billington, let me ask you—the number which you all have used of 50 percent of the films before 1951 having been lost forever, does that include films outside the United States or is that just American films?

Dr. BILLINGTON. I believe that applies just to American films, although I think a comparable figure would prevail worldwide.

Mr. SYNAR. And worldwide, we are really the only nation in the world that has really taken on this task of preservation?

Dr. BILLINGTON. Well, that is not entirely fair. I think Great Britain, for instance, with whom we collaborated when the Queen recently came to the Library for a festival of their films, has an exemplary film preservation program. I think Australia has an interesting one.

No. I think there are some other efforts but with a smaller corpus of films than we are dealing with.

Mr. SYNAR. What kind of budget numbers are we looking at for you all to implement the provisions of the Preservation Act for 1992 and 1993?

Dr. BILLINGTON. We are thinking of a slightly but not greatly increased number over that we have had. We have been operating on a $250,000 budget and we are thinking now of about $350,000. There are additional obligations and responsibilities, particularly including this national survey of the entire effort, and a conscious effort to coordinate this study is going to require a little more money. But we think not a great deal more.

Mr. SYNAR. Mrs. Kanin, the first year we had the Preservation Act in place there were 1,000 nominations. There have been some recommended changes in how we operate. One you mentioned, the feature length—whether or not just feature length could be considered; second, increasing from 25 to 100.

How is that going to affect the ability of the Board to handle it? Or will it become so unwieldy it will be unable to do it?

Mrs. KANIN. In my experience, the Board members are really eager beavers in this area. They are, I think, prepared to address and pay attention to any number of films that we get, and I think it is our intention to have as broad a universe as possible.

Mr. SYNAR. Would you increase it from 25 to 100?

Mrs. KANIN. You mean the selection? First, you were talking about the nominations.

Mr. SYNAR. Right.

Mrs. KANIN. My own personal choice would be to keep it reasonably small. In that case, I think it helps our ability to go to the copyright owners and ask them for donation of the materials. If we were to, say, have 100 films we were asking them for every year, I think we might find some closed doors. But, if we keep it at a reasonable number, 25 or some small number over that, I think it is still very handleable.

Mr. SYNAR. Let me ask you, Dr. Billington, would you think that the Board ought to be expanded to include animators, historians and documentary filmmakers?

Dr. BILLINGTON. Our feeling was that it should be slightly expanded to include the constituencies that we indicated, but the constituencies you mentioned are part of the creative community that I think is already fairly well represented on the Board. Moreover, in the process of nominating films, we have consulted, particularly the second year, quite extensively with those communities, and I think we would feel further impelled by the new legislation to consult with them even more because of the exemption from the feature-length requirement, so that we now have a much clearer mandate to explore that whole universe of diverse films.

I think those groups, if you are asking, should they be consulted and should they be fully heard in nominating the films, I think the answer is yes. To the question of whether to further expand the Board. We wouldn't be strongly opposed, but I think the answer would probably be that we don't think it is necessary.

The Board has had remarkable cohesion, I think we would all agree, under Mrs. Kanin's leadership, but it has also been a working board. Even though there are very strong differences of opinion, it works very well as a group. Beyond a certain size it would lose that kind of coherence and its ability to function on unified programs. That is just speaking to the question of total numbers, not necessarily those groups. But I think those groups are, in fact, pretty well consulted and will be even more so in our future processes. I wouldn't think it would be necessary to add them as representatives to the Board.

Mr. SYNAR. Mr. Moorhead, for an opening statement and questions.

Mr. MOORHEAD. Thank you. I particularly would like to congratulate each one of you, Dr. Billington and Fay Kanin, for the work that you have done in this area because I think that a great and an important part of our heritage is recorded in the films that have been showing over the last 50 or 60 years in the United States.

One concern I have is that while 25 films a year may be an adequate amount at the present time of the films that are made each year but given the better films that have been produced over a long period of time, 50 films doesn't seem like it even begins to give you a sufficient number to reflect the wonderful films that have been made.

Mrs. KANIN. The films we choose will be put in the National Film Registry and honored as significant films. But I think our hope is to preserve films on a much wider scale, to really raise some funds and do the job on a much bigger scale than even the films in the Registry.

Dr. BILLINGTON. The purpose, Mr. Moorhead, of the list is to focus on the aesthetic, historical, cultural value of film as a part of American culture and to dramatize the importance of their preservation. We certainly would be willing to add to it somewhat, if the Congress felt it were desirable. But the purpose of the list is to dramatize films and even if it were expanded it would only still be a drop in the bucket, of the vast preservation problem.

So we feel that in the long run our purpose is to have a list which continues to focus attention on the artistic quality, which it won't if it gets to be too large a list. We think the chance of hitting the bigger problems like preservation, is better solved by focusing on a list that is more selective.

Mr. MOORHEAD. Well, I think we understand that in the earlier days there was no television, there was no after market of sufficient nature so that many of the film studios felt that they would get rid of those old films because they had no economic value. They have become very valuable since television and people buy whole studios in order just to buy the film library.

At the same time it would seem to me that as a part of this total program we should do everything we can to encourage the creators of these films to provide means to protect them and to take care of them because 50 percent of 21,000 can go up to 75 or 80 percent of that figure of the old, old films unless we do something that assures a way of protecting them. It might even be a voluntary program that you could have to preserve at least one copy of some of those films that might be available. If the copyright still prevailed, there would be no reason for them to reject it. It would be an archive where we could really keep that important part of our heritage.

The major studios spend great resources preserving their libraries. Mr. Counter's testimony indicates that over half of the 50 films selected for the Registry belong to either Turner or one of the major studios—Turner is the one that brought MGM, so he has their whole film library—and were preserved before being selected for the Registry.

Would the Library's limited resources be better applied to works that are not owned by major libraries? Does it make better sense for the Library to dedicate its preservation efforts toward works in the public domain or works that are owned by smaller collectors or enthusiasts?

Dr. BILLINGTON. First of all, let me speak to your earlier statement. The Library has done more than half of the film preservation ever done in this country. This has been an enormous undertaking—we run the only full-time noncommercial black-and-white film preservation library in the country. We have been deeply involved in this preservation program and will continue to be.

But on the specific question of the famous studios, the point there, Mr. Moorhead, is that the work of restoration which the studios do in order to reissue or recycle films in another format or another medium is not always the same thing as preservation. What we are talking about is getting archival qualities of the original, or as close to the original as possible. This is a very exact and very difficult task. The studio is interested in today's and tomorrow's production and performance. They are not interested necessarily in archival preservation, although they are not opposed to it. Our hope is that we will get them more interested in the other problem of restoring an original, archival copy of the original work of art as first created.

Their restoration work tends to be revisions of copies that are themselves already revisions of what the original work was. So we think it is important for the Nation and the Congress, which has pioneered by supporting the Library of Congress's program for more than 35 years now, to assure that the history has archival copies of the original works of art as a part of the national memory and the national heritage, and that the studios will increasingly support that effort as well as their own restoration and recycling activities, which are quite different. They may overlap. They may contribute to preservation, but they are not designed for the same purpose. I think it is slightly misleading and implies that these two things are the same. Restoration or recycling of film material in new form is not the same thing as restoring the original film as part of the national memory and national heritage.

Mr. MOORHEAD. Thank you, and congratulations again for the work you are doing.

Dr. BILLINGTON. Mrs. Kanin.

Mrs. KANIN. I was just going to say that the National Center for Film Preservation—Film and Video Preservation at AFI is in the process of establishing a database which when it is in full operation will have a record of all the restoration and all of the preservation that is being done all over the country. With that in operation, we avoid the duplication of, say, the Museum of Modern Art, UCLA and the Library working on the same films. We will be able to pinpoint which films are already preserved, or which need it most.

When we were in Dayton at one of our meetings, at the Library's facility there, we had a young woman take us into the vaults and show us this crumbling nitrate. This one, she said, is going to go in about a week and a half and this one is going to be over in about 1 month. You just want to say, "Stop." But you can't say stop until you have got the money to make it stop. It was a very vivid, I think, picture of the problem and we are all very grateful for your interest and efforts in this behalf.

Mr. SYNAR. Mr. Sangmeister.

Mr. SANGMEISTER. As a matter of curiosity, and I believe the question would be best addressed to Mrs. Kanin, why hasn't there been more preservation since 1951? I can remember as a kid, and I think most people in this room, we watched the Academy Awards presentation and all the hoopla that goes with it, justified hoopla. I enjoyed the program as much as everybody else, and I think the profession was deserving of it. But I find it difficult to believe that the academy itself would not have been preserving many of these films and making very sure that they were in good shape and preserved for posterity and history and all that. Any explanation as to why there is even the necessity of our having enacted this past year and in 1988 to preserve these films when there should have been enough pride within the profession itself, I would think, to try to preserve those things?

Mrs. KANIN. Curiously, it is strange that for a long time no one thought there was any problem at all. Most of the studios, when they were through with prints, left them wherever they were, didn't even cart them back, because nobody felt there was a life after exhibition. For a long time people thought, "Well, there are the movies. They come. They go." We didn't really think of them as that great film heritage we now know they are.

Mr. SANGMEISTER. Well, when was "Gone With The Wind" produced? What year was that? Does anybody know offhand?

Mrs. KANIN. 1939.

Mr. SANGMEISTER. Well, that was back in 1939. They certainly preserved that. I think "Casablanca," I don't know what year that was either, but apparently the academy at that point or somebody felt that they were important enough to preserve.

Mrs. KANIN. No, not the academy. That would be Mr. Selznick, probably.

Mr. SANGMEISTER. Well, whatever year, it was far before 1951 as we are kind of using as a date.

Mrs. KANIN. The first year that I was president of the academy, the president has to make a speech on the Academy Awards. I spoke about the need to preserve our film heritage. It was the first time that anyone had ever really said that in a national forum, and

I got letters and phone calls from every archival institution saying, "Thank you for bringing this to the public attention. We have been laboring with very little money. It is very costly to preserve film, and we have been working with very little public knowledge of what we are doing." Suddenly, the word was out in a national forum.

It has been a well-kept secret, curiously. Nobody has really raised the money to do this enormous job.

Mr. SANGMEISTER. But in your investigation, as you were saying, you were going through these vaults. As I understand it, the film would be there but what, the acetate or the film itself is deteriorating? Is that what causes the problem? Which could be, I presume, simply enough done by rerunning it and just putting it on———

Dr. BILLINGTON. No. It is on nitrate film stock. Everything before 1951 basically is on a nitrate base which disintegrates. It can self-destruct at 112 degrees Fahrenheit. It is very explosive. It degenerates, in fact, virtually into gunpowder. It is one reason we have the work done out in Wright-Patterson Air Force Base rather than here on Capitol Hill.

And it is worth mentioning that we have concentrated heavily at the Library on transposing nitrate to longer lasting safety-based film, but technicolor and other technologies also have severe internal degeneration problems built into them. You have the fragility of the basic material on which the film is made, you have the fact that colors fade and the films shrink up, and you have the fact that these films can only take a certain number of showings. It is a very fragile medium. Also, it gets cut up and repasted over the years.

So, for a variety of reasons, the question of restoring an original archival copy is an immensely complicated one—it is a major work of both scholarship and negotiation to get donated pieces. The Library, which is the dominant player in this over the years, thanks to the generosity and the vision of the Congress, has received a lot of this stuff over the years as donations, but then has been faced with doing the preservation and the restoration work so that it is a very substantial undertaking—we have at least 60 million feet of unrestored nitrate film still, even though we have been doing as much as everybody else combined all these years.

We are really dealing with a problem of very large, very large dimensions, and all we are doing here is providing a mechanism for dramatizing preservation and hopefully making a more coordinated effort.

Incidentally, I think that coordination among the archives is very strong already. We have collaborated, for instance, with the Museum of Modern Art on the restoration of "Intolerance," which has received a lot of attention recently, and we have collaborated with UCLA, and so forth. I think there is good communication and it will get better if we have the added authority and the 6-year running time to coordinate and develop a national plan.

Mr. GLICKMAN [presiding]. Thank you. Mr. James.

Mr. JAMES. Yes, I am curious. What is the average life of a nitrate film? Thirty years? Fifty?

Dr. BILLINGTON. I don't know. Dr. Loughney.

Dr. LOUGHNEY. It depends on the conditions under which it is stored.

Mr. JAMES. I mean the ranges. I understand that.

Dr. LOUGHNEY. Right. There is nitrate in the Library's collection as old as 70 years. There is also nitrate that has disappeared within the first 5 years it was made. So, it depends once again on the humidity and the temperature.

Mr. JAMES. OK. So you have got all of those millions of feet of film. All of it is going to go within a relatively short time span. Some of it will be gone next month, right? And so you can't hope to get all that done. You are going to lose a good portion of that, right?

Dr. BILLINGTON. It is fading all the time, that is right. We keep it under controlled humidity and temperature conditions out at Wright-Patterson Air Force Base, so that maximizes the chance of survival. But nevertheless, it is still disintegrating.

Mr. JAMES. So that list of the 25 films you pick, many of those would have, of course, already be preserved commercially because of their tremendous value. I assume that of the 25 a good percentage of them would be significant films in a commercial sense.

Dr. BILLINGTON. But they are not necessarily preserved in their original form.

Mr. JAMES. Right. I understand that problem.

Dr. BILLINGTON. Some version of them is out commercially. Sure.

Mr. JAMES. OK. So once you preserve it in its original form, suppose the Library of Congress winds up with its only copy. Who would you let get a duplicate of it? I mean, you would have to go back to the copyright people, right? I mean to the people that have the copyright on it to get their permission.

Dr. BILLINGTON. That is right.

Mr. JAMES. Would you give them a charge, especially if they didn't have their own film? Is there some suggestion—you might even have a self-sustaining program if the copyright person wants to use your film and he hadn't preserved his own copy. That would seem like an unusual scenario. But how many times has that happened?

Dr. BILLINGTON. I will let Mr. Schwartz of the Copyright Office respond to that.

Mr. SCHWARTZ. Most of the original materials we received, for instance, we received by gift, not through copyright. As Congressman Moorhead said, 20 or 30 years ago there were not any known markets for these materials except for the theaters, and so materials, original materials were donated by the studios to the Library by gift. Under the instruments of gift the Library received the materials but the copyright owners retained all rights in copyright in the material as well as the right to obtain the physical materials to duplicate these materials when and if they ever thought they would have the need to do so. And, in the interim, the Library preserved these materials in some cases in conjunction with the studios, working cooperatively to do the preservation work.

Mr. JAMES. So the Library has the preserved form. How does the public have access to viewing that film, let's say, if there is only one copy?

Mr. SCHWARTZ. Well, the Library, for instance, will strike a print, a reference print, for its collection that an individual scholar or film student can view on a flatbed in the Library. But the original material is never touched by the public. And, it is still under copyright protection and the distribution or exhibition of that film, even if the Library wants to do it, has to be done with the permission of the copyright owner.

Mr. JAMES. Well, somebody did something very special with the film clips of the "Three Stooges" because for the last 40 years I have seen the same, you know, "Three Stooges" films. Apparently there are a lot of films like that we all see repeatedly on television, you will see again and again, so some of that celluloid tape has been preserved, and it is hard to believe that a high percentage of it has dissipated that is of any great value.

That is a comedy, of course, and is very enjoyable, and it has a commercial value and has for a long time. But it seems like there is a tremendous number of films that have been preserved or reprinted, if not in the original form.

Mr. SCHWARTZ. Well, the fact that it is widely available or even on TV doesn't mean that it has been preserved. What you may see is a second, third, fourth, sixth generation copy of it.

Mr. JAMES. I see.

Mr. SCHWARTZ. What the Library is concerned with is getting the original materials, the preprint material, and in many cases we have that or have obtained that by gift. Otherwise by this law we are trying to get it, or at least get an archival-quality copy, maybe not the preprint material, by gift from the copyright owners.

Mr. JAMES. Do we have similar problems now with books, but it is just a longer span of time, with original manuscripts or books, do we not, where the paper disintegrates because of the technique used in making the paper that has a relatively short span? What are we doing specifically about the books in a parallel situation?

Dr. BILLINGTON. This is an area in which, again, the Library of Congress with the support of the Congress has been the pioneer nationally, in developing a very extensive program and a technology for deacidification which has now been licensed out commercially and will be of great benefit to the libraries around the country. It is a gas diffusion process which will deacidify paper.

The Library itself has not made a commitment to a process. We plan, however, to begin mass deacidification in a couple of years. We have an RFP out hoping to hear from various technologies, including the one that we have now licensed out for commercial use, to the considerable benefit of the Treasury, not to the Library. The latter process was developed by technicians in the Library. These same anonymous wonderful people who work and are restoring the Nation's heritage have developed a technology which is going to be widely used, I am sure. There are other competing technologies. We will choose among one of them and begin mass deacidification of up to 1 million books a year if the current markup that we have been given so far from the House Appropriations Committee holds up. Congress has already appropriated a great deal of money for book preservation. The Congress of the United States is the principal real sponsor and patron of preservation of endangered cultural materials.

Mr. JAMES. I have one more question.

Mr. HUGHES. The time of the gentleman has expired. We will have another round if the gentleman has other questions.

Mr. JAMES. Thank you.

Mr. HUGHES. The gentleman from Kansas.

Mr. JAMES. I am sorry. I didn't see the lights. You have said that before.

Mr. HUGHES. The gentleman was well beyond the time.

Mr. JAMES. I wasn't beyond 5 minutes, but excuse me.

Mr. GLICKMAN. Well, I want to compliment my colleagues, the Librarian of Congress, Dr. Billington, whom I have had the pleasure of knowing for many years. He is an outstanding historian and somebody this country should be very proud of, and an expert on the Soviet system, and I am sure he has been very busy the last few years in that capacity as well.

Let me—and I also want to thank you, Mrs. Kanin, for your comments. I think you are entirely right. The history of film has as much to do with our historical culture, as well as where we are going in the future, as certainly any other medium does, and it is uniquely American. And this legislation is an attempt to secure it so that we preserve what is best out of that.

I want to talk for a moment about labeling. It is a controversial issue. I notice that under this bill, H.R. 2372, you will not be involved in labeling. And I have met with folks on both sides of this issue. Actually, in years past I even was a sponsor of the bill dealing with colorization, but I must say that I have begun to have some difficulties with the issue of the Federal Government getting involved in the labeling of films other than what is implied in this particular legislation. You know, it seems like it ought to be a matter of contract between the parties. And I don't know if that is feasible or not, but it seems that is more appropriate than having Uncle Sam coming in and, you know, giving it a label.

I would like you to respond to that, but in this context, Dr. Billington. Mr. Silverstein's testimony—and I am going to read part of it, and, of course, he will testify after—says some things about the Library that I think is useful for you to comment on.

On page 3 he talks about "the political victory in the Film Preservation Act was impressive," but "the advancement of artist rights that victory achieved was modest indeed," and he goes on, "the mere placement of labels on a few materially-altered films named to the national registry. First through regulation and now through this draft of the proposed reauthorization, the Library of Congress has blunted the original legislation to serve solely the purposes of preservation." That is a pejorative, you know, as far as I am concerned.

Then on page 4 he says, "Whatever dignity was to have been afforded these masterwork American films is now to be severely compromised because the Library's solution will tend to confuse the authentic with the unauthentic." And, of course, that has to do with this issue of original and complete, I presume. "It is unclear," he says, "why we must tiptoe around the truth."

Well, it seems to me he is taking a shot at you, and I thought you ought to have a chance to respond to that.

Dr. BILLINGTON. Well, I think there is a tendency to take a complex of problems and look for a simple institutional solution. He says we have blunted the intention of the original law. I think the Library of Congress was an extremely blunt instrument to enforce the kind of things that many people wanted to do in the labeling business. We are not getting out of it completely. We have what we think is a sort of a truth-in-advertising, kind of Good Housekeeping seal that will be voluntarily available to be put on these films that are thoroughly restored to their original basis.

But there is a whole series of problems that were inherent in the labeling requirement. There was not a clarity of congressional intention and our job was to enforce what congressional intention was. There was conflict between the concerns over "material alteration" on the one hand and concerns over customary practices, which were both mentioned in the act and in the Congressional Record. There was that problem.

Moreover, there is a lack of clarity in whether you are concerned about identification for the consumer; that is, identifying what has been changed for the consumer, or you are protecting the moral rights of the original creator. Those are two very different concepts which have to be clarified if you are going to have a labeling requirement.

Finally, there was a lack of clarity, and it proved extremely difficult to determine how you define "material alteration" and how you balance the concern to identify that with the various kinds of modification that are involved in changing film for another media and so forth, e.g., what are the normal practices?

Now these are all very real questions. I don't mean to minimize them. I as a writer and a custodian of the Nation's heritage am very concerned about this, just as you are concerned about the folio editions of Shakespeare versus all the changes for different productions later on. But our job is to restore and preserve those archival copies and have them available to the American people. The question of adjudication between these things properly belongs to the courts it seems to me rather than my attempting as an executor of the Congress' will to define it in any more precise way.

We tried it. We had a genuine go at it. We came up with a solution which satisfied nobody, as I think was probably predictable. But I think we also learned in the process what are the issues that have to be sorted out, so that if an independent pursuit of this question can be done, it can be done with a more appropriate choice of an enforcement medium than the same people who are supposed to preside over a process of authenticating and presenting and preserving the original archival copy, so that the authentic national memory is kept intact. That seems to me to be our job. Not that the other is unimportant.

Mr. GLICKMAN. I think that is a good response to my question. Thank you, Mr. Chairman.

Mr. HUGHES. I thank the gentleman from Kansas. The gentleman from New York.

Mr. FISH. Thank you, Mr. Chairman, and I welcome you all. Dr. Billington, it is nice to see you again.

I would like to go back to this 50 percent of films made before 1951 have been lost forever because, of course, that is my impressionable period, with "Gunga Din," "Beau Geste," "Kim," "Charge of the Light Brigade," all of the late thirties and early forties, and then, of course, the Disney cartoons like "Snow White."

Isn't it just possible to take a film and copy it onto fresh celluloid, and that you keep doing that so that you keep its life going?

Dr. BILLINGTON. Well, no, if what you are copying isn't the original version of the film. You have to go back and reconstruct where it hasn't been preserved, and in very few cases it is the original film that you are seeing. There are immensely complicated questions about this because film is something that gets changed and cut up even in the process of releasing it commercially. They may show it for a while and then change it slightly, and then come the real difficult adjucational questions as to what is the original, and then there are supplementary problems as to how you find it, how you reconstruct it, when the version you are seeing rerun on television today is almost certainly a very different version from the one you saw as a kid and that I saw as a kid at the old Saturday matinees.

What we are trying to do is to restore the film version of what the original one was, and that is a much more complex problem both jurisdictionally and from a scholarly point of view than I think we would assume.

Mrs. KANIN. May I just add to that? Maybe 6 or 7 years ago the academy decided to try to restore "A Star Is Born," the George Cukor version. There had been enormous cuts made in it for various reasons, and the cuts had been done out at the film exchanges. The exchanges themselves had made cuts for time and for whatever were the economic necessities. We, with George Cukor's help, tried to find the original material that had been cut, and Warner Brothers very generously allowed us into their vaults. Someone spent almost a year and a half going through all of the vaults looking for bits and pieces of the film. Some of it we never found, a lot of it we did. A couple of wonderful numbers that were in the original we added to it. We found stills and put them in place of missing footage. Anyway, we accomplished a very interesting restored version, though some of it was gone forever.

We recently did that with "Spartacus." Also very hard to get the original back into some shape because pieces of it were everywhere and the original negative had been cut. But we have wonderful people in this field who really work with great passion, and we are going to get those films back the way you remember them as a boy, Mr. Fish.

Mr. FISH. Mrs. Kanin, the legislation, I understand, provides for a study by you as to how to preserve ownership of films in the private sector.

Mrs. KANIN. I didn't understand the question.

Mr. FISH. You are going to have a study in the private sector as to what ownership of films is out there and where they are and who has got them.

Mrs. KANIN. I think that is a part of the new bill, is it not?

Mr. FISH. Yes.

Dr. BILLINGTON. Yes. To get a comprehensive kind of inventory of what everyone is doing and the systematic factual base for beginning to develop a coordinated national policy in this area.

Mr. FISH. Now, Mrs. Kanin, in your testimony you indicated that the Board received almost 1,000 film nominations in the first year alone, and the proposed legislation would remove the requirement that films in the Registry be feature length. Does this present a problem? Are you concerned that the Board's responsibilities will become more unwieldy with this change?

Mrs. KANIN. I mentioned a little earlier that I think we have a wonderful Board that is gungho to do the job. And I think however many titles as we get to consider, that the Board is going to be able to deal with.

Mr. FISH. Good. Fine. Thank you, Mr. Chairman.

Mr. HUGHES. I thank the gentleman. The gentleman from North Carolina.

Mr. COBLE. Mr. Chairman, I was with you at another meeting, so I missed most of the testimony from this panel.

It is good to have you here. Dr. Billington, let me just take a wild shot. When we got into the business of legal services some years ago that was to be the cure-all to everybody's problems, and as an ancillary result much of the private money disappeared. Now, if the Government becomes too obviously involved or intrusive, for want of a stronger word, into this area of preservation, am I being overly cautious or overly concerned when I anticipate the disappearance of some Federal activity or private sector activity? Oh, let the Federal Government take care of it. They will handle all of the problems. Well, I am not so convinced that the Federal Government handles all of the problems all that efficiently. What say ye to that?

Dr. BILLINGTON. First of all, there really isn't much—there is, frankly, a disappointingly small amount of private money that has ever been involved in this whole field. There is not too much of any kind of money, public or private, for that matter. Film preservation has really been a seriously neglected field which the Congress is helping rectify.

I think that, far from discouraging, this Board is a very good implement for encouraging greater private activity from its present, I would say rather disappointingly low, base. First of all, there has been some increase just in the course of the 3 years. I think your trial run period has aroused interest and awareness and cooperation. We have gotten, as Mrs. Kanin said, pretty good cooperation from the studios, which have, frankly, heretofore been largely donating films and leaving it for us to restore in the Library of Congress without providing much material, financial support.

The composition of the Board represents the major private players in the game, and therefore it gets them in a coordinated mode focusing on the preservation problem. And, with the renewal and its exclusive focus on preservation, it should have even added promise over what it has already provides to stimulate further private cooperation and financial support.

I think this is a very good way of federally seeding a problem which is going to require very substantial private support, particularly on the part of the studios. And I think it is a good and promising means for increasing private support, and certainly not supplanting it because, as I say, there hasn't been that much to supplant. And I think rather than supplant this will plant.

Mr. COBLE. I am glad I asked the question. I feel better, Mr. Chairman.

Mrs. KANIN. We don't want to dry up any source.

Dr. BILLINGTON. I don't know if Mrs. Kanin has anything to add.

Mrs. **KANIN**. No, that was a very fine response.

Mr. **COBLE**. I have nothing further, Mr. Chairman.

Mr. **HUGHES**. Thank you. Both the Directors Guild and the Writers Guild express concerns about the promotional use of a seal and the fact that a film has been included in the Registry. Both the Writers Guild and the Directors Guild are concerned that consumers will be misled that the seal and the Registry are used to promote versions of films that are not the original and complete versions as included on the Registry.

What are your views, Doctor?

Dr. **BILLINGTON**. Well, the seal can only go on original and complete versions as certified by the Library's professionals or as agreed to by the Library that it adheres to the Library's standards and is affixed by other restoration centers or by copyright owners themselves. But it can't be used in any other way. This is an affirmative seal whose use is voluntary.

Mr. **HUGHES**. So it is not a problem as far as you are concerned?

Dr. **BILLINGTON**. I don't think it is fundamentally a problem, but I would be happy to respond to any more detailed concerns that they might have.

Mr. **HUGHES**. Mrs. Kanin, anything you want to add to that?

Mrs. **KANIN**. No.

Mr. **HUGHES**. OK. The Writers Guild, West, states in written testimony that the seal will rarely be seen by the American public on films because so few are shown in their original and complete version as they were first published. Most are shown on television or seen on video. How do you anticipate that the seal will be used? As a practical matter, is the seal going to have much significance really under the proposed legislation?

Dr. **BILLINGTON**. I think it will have increasing significance because I think it will stimulate an interest that isn't presently there—one that is sort of latently there, as we have heard from the questions—to focus on seeing the original film. Not a television retranscription or a version that goes back two stages, but one that goes back to the original creation. An increasing awareness by that kind of certification of the original film will stimulate, I think, revival showings and so forth. I think it will be a slow process. It won't have a dramatic effect, but it won't engender the counterproductive quarreling either. It will be a steady buildup thing which I think will increase interest in seeing the original films, by a broader public as well as restoring them for the national memory.

Mr. **HUGHES**. The Motion Picture Association has raised a concern about the term "original and complete" as used in section 304(a)(2)(C) of the bill relating to the use of seals. MPAA notes that "Spartacus" and "Lawrence of Arabia," for instance, as rereleased contain footage not included in the original version as first published, and the language in the bill should provide for placement of seals on preserved films.

What is your view on their suggestion?

Dr. **BILLINGTON**. Well, I think that "original and complete" provides a kind of certainty that "preserve" doesn't. "Preserve" tends to relate to physical quality, not to the length of the film, to the editing, and so forth. I think that there is not going to be any 100 percent perfect word, but "original and complete" is as certain as you can go. It provides a kind of certainty that something that is preserved won't be just a partial thing, as I said, related largely to physical quality.

I think "original and complete" is also good because it has a positive quality. It is not a pejorative label. It will encourage, I think, film viewers over the years to look for the seal. And I think the term "preserve" puts us back into uncertainty; it could allow the seal to be used on films that are edited, altered and the like. And I think we have a greater certainty with "original and complete" than we do with preserve.

Mr. HUGHES. Mrs. Kanin, the Board has done an excellent job from all accounts and you are to be commended because you are unquestionably trailblazers attempting to, basically, implement legislation that was new, a new approach, and it has done a very good job. But the legislation, the original legislation that was the compromise is very specific, naming specific departments of universities, for instance. Do you think it is wise for us to be so specific? I have no doubt but that we need the kind of broad balance and the cross-section that we see in the legislation, and it has functioned fairly well for the past 3 years. But now we are talking about implementing legislation that will carry us for 6 years. What is your view, really, on why it is important to be so specific?

Mrs. KANIN. You mean to name the categories, the institutions?

Mr. HUGHES. Yes. First we name the Department of Theatre, Film and Television of the College of Fine Arts at the University of California, Los Angeles.

Mrs. KANIN. Because you would not want a representative from anything but the film and television department. They are the most knowledgeable, probably the most interested, and I will use the word again, the most passionate to serve on the Board.

As I look over the choices, I think they have been eminently proper, and I think the additions that the new legislation has———

Mr. HUGHES. My point is that it may very well be that Rutgers University, my alma mater, or the University of Massachusetts may develop an outstanding fine arts department ad they may very well want representation on the Board. I mean, we can certainly receive nominations from various departments in universities and other organizations around the country without naming them specifically.

Mrs. KANIN. My feeling is that the ones you have chosen are preeminent in the field of preservation and have done the most in that area. I think there is a mechanism for inviting the counsel and the participation of all universities who are wish to participate. We have and will continue to invoke the participation of your university and any others. Anyone who wishes to be part of the nominating process is welcome. But I think for the actual serving members of the Board you have selected the preeminent organizations in the field. I think they have done a remarkably good job.

Mr. HUGHES. Dr. Billington, on the same subject, and I would be very happy to hear from you on that particular point, is the question of nominations. I can see where a librarian would be subjected to much pressure in some instances. Would it be wise for us to look at a, perhaps, selection process that relieves you of some of that pressure by having others make nominations? For instance, here in the Congress it is not unusual for the Speaker to make nominations to boards, and the Minority Leader makes nominations, as well as the President of the Senate. What is your view on that?

Dr. BILLINGTON. I think there are a variety of ways that the composition of the Board could be constructed, or reconstructed. I think that the original choices that were made—I am not just saying this because they happen to be the ones sitting there—I think have proven to represent a good diversity of the positions and opinions of interested advisors, and by most people's belief I think a pretty good cross-section of the major institutions. Now there are not that many institutions involved in film preservation archives. As I have indicated, the Library of Congress does half the work. The other half is done in other archives. The major players are only UCLA, Museum of Modern Art, the Eastman House in Rochester, University of Wisconsin, and may be a couple of others. But there aren't that many players, and UCLA and NYU, I guess were the ones chosen from that universe. There are a larger number of film schools and programs, and these were picked out of that universe. I think those, both institutionally and the people that they have sent, have been outstanding, so I would have had a hard time saying that the present composition should be rescrambled.

Mr. HUGHES. Well, no, that is not the point.

Dr. BILLINGTON. It could be.

Mr. HUGHES. I am not even suggesting that—we may very well under some other system end up with the same composition of the board as it now exists. I happen to agree that the cross-section is probably well and it has served us well. But it is a bit unusual. I don't remember in any legislation seeing us, you know, basically give a seat on a commission to a specific organization. That is most unusual. And I can see some problems down the road that we haven't experienced with regard to that.

Dr. BILLINGTON. That is, you know, a question for the Congress to decide. But I would say, and I think Fay would probably agree as the chairman—certainly I—as a witness to whom the Board serves as advisory—have felt that they are pretty conscientious about representing the interest of the whole universe they represent. If anything, it has an institutional obligation, rather than an institutional favor.

Mrs. KANIN. If this is the first time you have done a very good job. I mean, if this is the first time that institutions have been named, the choices have been very felicitous. Because this Board has worked admirably well together. It is a group that has, as I said, diverse opinions but has used them to serve the cause. Everyone on that Board has earned his or her place in the field. They are not there because they know anybody or because someone likes them. They are there because they have earned their place.

Mr. HUGHES. You have been very helpful, and I am not suggesting that the system isn't a good system, that the folks who have served on the Board haven't done a good job. On the contrary, as I indicated at the outset, I think they have done a very good job.

Mrs. KANIN. I have sensed that. Yes.

Mr. HUGHES. But we are now implementing for 6 years. Now is the time to look at these issues.

Dr. BILLINGTON. If you wanted to propose rotation among comparable institutions, I mean that would be all right, although you would lose some of the values of continuity and experience. I am not sure that it would make that much difference in terms of fairly representing the interests of that universe. Because my impression is that the people representing, although they come from a given institution, feel their responsibility is to represent that whole universe of comparable institutions. In any event, that universe is fully consulted by me and the Board as a whole on the selection procedures and the other important judgments.

But I think somebody has to decide, and I think if the Congress wishes to reexamine that that certainly would be appropriate, this would be the appropriate time to do it.

Mr. HUGHES. Thank you. The gentleman from California.

Mr. MOORHEAD. Yes. Dr. Billington, while I had you here I wanted to ask you a question on a kind of affiliated subject. Last year the Congress enacted legislation directing the Librarian of Congress to establish four positions for Associate Registers of Copyrights in accordance with the recommendation of the Register. I know we kind of negotiated with Mr. Tabb, who I see back there, and we had the assurance that those positions would be filled. I wonder what progress has been made in that direction?

Dr. BILLINGTON. We have filled two and are working on the other two.

Mr. MOORHEAD. How soon do you expect to have those other two filled?

Dr. BILLINGTON. I can't really say. I would have to consult with my people and see where it stands at the moment.

Mr. MOORHEAD. Could you kind of let me know what the plans are in the next few weeks?

Dr. BILLINGTON. Yes, sir. We will let you know right away.

Mr. MOORHEAD. Thank you.

Mr. HUGHES. I have just a couple of additional questions. The nature of the films added to the Registry is broadened to include documentaries and cartoons. Do you think that the Board should be expanded further to include, for example, animators, historians or documentary filmmakers?

Dr. BILLINGTON. We didn't think so because we think that in the process of selecting we are going to consult with those groups. We have already consulted with them and we will be consulting with them even more under the new provisions which call for its being not just commercially released feature films. So I think at some point one gets concerned about the size of the Board. It has very good dynamics now. We think it can take the small number of additions that we have proposed. We think these would have to be additive to those and that you really do get into the business of getting too large a body to function effectively. Also, it increases the cost that goes into board meetings rather than film preservation, and we wanted to hold that down and put all of the bang on the preservation buck.

Mrs. KANIN. Just on that point—we are very pleased that the actual expenses of the Board have been minimal. That we have saved the majority of the funds that have been assigned for actual preservation use. We are very pleased about that. I thought you would like knowing that.

Mr. HUGHES. I think you have very eloquently indicated just how passionately the members of the Board serve. They have done an extremely good job. I am not questioning that work at all. It has been superb. I wish all start-up programs worked as efficiently and effectively as this one has in its maiden voyage. So we have no complaints.

Section 303(a)(2)(D) of the bill, Doctor, you would have set the standards for the preservation and restoration of films that would be used to determine whether the film qualifies for the use of the seal. What do you anticipate the standards will be?

Dr. BILLINGTON. Well, it is the "original and complete" standard as far as it can be determined by the technical and scholarly work.

Mr. HUGHES. Do you have specific guidelines that your technicians use in making the recommendation to you?

Dr. BILLINGTON. Yes. I could get this explained more fully. The important point is that there are always going to be little elements of uncertainty in judgment and it is important that there be one standard point of reference for a quality control seal of this kind. That is why we think that the Library's Motion Pictures' Broadcasting and Recorded Sound Division which has been working on this since the late fifties is the logical place.

It is a voluntary thing and, as I say, others will, as long as they coordinate with us and satisfy the same standard, other centers will be able to affix it as long as it is authorized by the Library as a central point of reference, which we think is important.

Mr. HUGHES. How many films have been selected for the National Film Registry to date?

Dr. BILLINGTON. Fifty so far and we will discuss selection of another 25 this week.

Mr. HUGHES. On Friday.

Mrs. KANIN. Tomorrow.

Dr. BILLINGTON. Well, we will discuss it tomorrow.

Mrs. KANIN. We will discuss it tomorrow, right.

Mr. HUGHES. Does the gentleman from California have further questions?

Mr. MOORHEAD. Nothing, Mr. Chairman.

Mr. HUGHES. Well, thank you very much. You have been very helpful. We appreciate your contributions today, and again we commend you for your splendid work. Thank you very much.

Mrs. KANIN. Thank you.

Dr. BILLINGTON. Thank you, Mr. Chairman.

Mr. Chairman, I just would like to say a word about all the hard work done by the people from the Motion Picture Division of the Library of Congress, and Mr. Schwartz and the others in the Copyright Office. I think their work has gone beyond duty, and one reason that the overhead has been so low, as Mrs. Kanin is reporting, is the extraordinary amount of dedication, and real enthusiasm and interest that the staff at the Library of Congress has shown. I am the person who shows up at the photo opportunities, but I just want you to know there are an awful lot of people doing really dedicated work in this field for a long time, and in other archives as well.

Mr. HUGHES. We understand that in the Congress. And we thank the staff for their superb work.

Mr. HUGHES. I would like to welcome our second panel of witnesses this morning representing different perspectives on film preservation in the proposal under consideration.

Nicholas Counter III is the president of the Alliance of Motion Picture and Television Producers, and is a member of the National Film Preservation Board. Today, Mr. Counter is testifying on behalf of the Motion Picture Association of America.

Elliot Silverstein, a prominent director of films, will testify on behalf of the Directors Guild of America. Mr. Silverstein serves as chairman of the guilds' President's Committee and has led the guilds' efforts to protect moral rights of filmmakers.

Brian Walton is executive director of the Writers Guild of America, West, an organization that represents approximately 7,000 writers of film, television and radio in the United States. Both Writers Guild, West, and its sister organization Writers Guild, East, serve on the Film Preservation Board as well.

I know that Mr. Walton and other witnesses traveled great distances to testify today and we very much appreciate your being here today. We have your testimony, which will be made a part of the record in full, and I am going to ask you to summarize for us—we don't want you to read the statements—so that we can get right to questions, if we could.

Why don't we begin with you, Mr. Counter? Welcome.

STATEMENT OF NICHOLAS COUNTER III, PRESIDENT, ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS, LOS ANGELES, CA, ON BEHALF OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

Mr. COUNTER. Mr. Chairman, and members of the committee, as you indicated, my testimony today will be on behalf of the AMPTP—the Alliance of Motion Picture and Television Producers—as well as the Motion Picture Association of America. The AMPTP represents over 200 companies which produce movies and television shows, and included among our members are the eight major film producers and distributors that make up the MPAA.

Now, the AMPTP is responsible for negotiating collective bargaining agreements with the guilds and unions in our industry who represent the many, and I emphasize the many, collaborators employed to make movies. The American motion picture industry is committed to the preservation of one of its most important assets, its film libraries. Motion picture studios and other owners of film libraries spend tens of millions of dollars each year on film preservation and restoration. My written testimony contains a number of examples of ways the MPAA and its member companies have undertaken, financially supported and otherwise assisted programs to advance film preservation in America. They fund not only their own substantial in-house programs but also support outside programs.

As indicated earlier, the MPAA and the Turner Co., own in excess of 50 percent of the first 50 films already selected for the Film Registry. They needed no special incentive to preserve those films. Virtually every one of the MPAA and Turner films had been meticulously preserved long before they were selected for the Registry. That is why the AMPTP and the MPAA appreciate the interest of Congress in this area and its desire to advance film preservation, particularly for those works which have passed into the public domain or those which have been neglected by others.

The AMPTP and the MPAA strongly support the film preservation goals of the Librarian of Congress and the principle of preservation embodied in H.R. 2372. With equal strength, we oppose any legislative effort to require the labeling of motion pictures. As you know, the 1988 act was not acceptable to us. We strongly opposed it because it imposed conditions on the distribution of motion pictures that are adverse to the constitutional principles of free speech and the advancement of the public purposes of our copyright laws.

As a member of the Film Preservation Board, I have had a perfect vantage point to see the problems that arise when a government-sanctioned agency is in the business of administering and enforcing a labeling regime that is linked to government classification of protected and expressive materials. I, like you, would like to commend the Librarian and his staff for administering a cumbersome law in the most professional way possible. He forged consensus and focused our attention where it was most needed, in film preservation. If there are to be labels, the matter should be addressed, and you have indicated that it will be addressed, at another time, but in our view it should be addressed by the private sector. Private contract laws should be the mechanism by which enforcement is obtained, not through a government agency. And frankly, it is our view that that is what collective bargaining is for, particularly in a heavily unionized industry such as the motion picture industry.

And finally, only the copyright owner should have the right to decide how to present or label his or her work in order to assure the widest possible dissemination of that work. That of course, is the fundamental principle behind our copyright law which this subcommittee so strongly protects. And, if the Congress wants to review some of these other questions, as you have indicated will be done at another time, we are glad to see that it will be handled by this subcommittee.

Before concluding, I would like to highlight some of the important technical aspects of the bill that we think the subcommittee should direct their attention to. The first has already been mentioned and that is in the definitions under section 304(a)(2)(C) which mandates that all films included in the National Film Registry be "original and complete." We have a difference with the Librarian here in terms of the terminology, frankly. And I heard his testimony earlier. His point going to clarity and concrete understanding as to the terms is, of course, a good one. However, we are concerned about the terminology "original and complete" and how it could impact other legislation, other copyright laws that are presently on the books.

We think that the phrase should be modified to reflect the preservation goal of this bill, and if there is some term that could be devised that meets that goal we think it should be considered by this subcommittee.

Second, the AMPTP and the MPAA would not object to the seal where its use on a copyrighted work is entirely voluntary. This is consistent, we think, with concerns we might have under the first amendment to otherwise mandate a seal. However, the language of the bill must be changed to specify that only a copyright owner may apply the Registry seal to a copyrighted film print. We think that is important.

I made several other points in the written testimony which I will not go into at this point. But I do want to emphasize that we do support expanding the Board to include of other organizations and interests. I would also mention that there are so many different collaborators involved in the making of a motion picture that some of them have not been heard from in our past deliberations. One is going to be addressed, is already addressed in the bill. That is the cinematographers. I would also mention the people like the editors, art directors, costume designers, composers of the music that goes into our films, makeup artists on particular kinds of films, and special effects personnel as well. All are involved in this process. One organization that does represent most of those disciplines is the International Alliance of Theatrical and Stage Employees, which is the bargaining representative for those groups of employees with whom I deal in our labor negotiations, and perhaps they should be considered for a spot on the Board. That is not in my written testimony. I mention that today.

In summary, it is critically important, as Chairman Hughes noted in his remarks introducing this measure, that we not let the focus of this bill shift from the universally supportable goal of preserving our endangered film heritage. Every effort should be made to ensure that the energies of the Librarian and the National Film Preservation Board are directed toward guaranteeing that the fragile fruits of our cinematic history are maintained for future generations to enjoy.

Thank you for allowing me to testify.

Mr. HUGHES. Thank you, Mr. Counter.

[The prepared statement of Counter follows:]

Testimony of J. Nicholas Counter, III
on behalf of
The Alliance of Motion Picture and Television Producers
and
The Motion Picture Association of America
on Title III of H.R. 2372, the National Film Preservation Act
House Judiciary Committee
Intellectual Property and Judicial Administration Subcommittee
June 12, 1991

Mr. Chairman, Members of the Committee, my name is J. Nicholas Counter III. I am the President of the Alliance of Motion Picture and Television Producers-- known as the AMPTP. I am AMPTP's delegate to the National Film Preservation Board.

The AMPTP represents over 200 companies that produce movies and television shows -- including the eight major film producers and distributors that make up the Motion Picture Association of America.

AMPTP is responsible for negotiating and administering collective bargaining agreements with the guilds and unions that represent those employed to help make movies. We negotiate with the directors, writers, screen actors, musicians, art directors, cinematographers, editors, costume designers, make-up artists, sound engineers and set designers -- these and the many other professionals who collaborate with producers to make a motion picture.

The American motion picture industry is committed to the preservation of one of its most important assets: its film libraries. Motion picture studios and other private sector owners of film libraries spend literally tens of millions of dollars every year on film restoration and preservation.

AMPTP and MPAA appreciate Congress' interest in this area, and certainly share its desire to advance film preservation efforts, particularly for those works which have passed into the public domain or are being neglected.

Nevertheless, AMPTP and MPAA opposed passage of the National Film Preservation Act of 1988 and the formation of the Film Preservation Board. We feel strongly that the 1988 Act imposes conditions on the marketing of motion pictures that are adverse to constitutional principles of free speech and the advancement of the public purposes of copyright.

The Congress should not empower a government-sanctioned panel to make aesthetic decisions -- and certainly not to choose which version of a particular film produced by private citizens is "preferable" or "superior."

Three years of attempting to operate under the 1988 Act demonstrated the undesirability of having any government-sanctioned agency in the business of administering and enforcing a labeling regime that is linked to a government classification of protected, expressive works. Indeed, only a copyright owner should have the right to decide how to present or "label" his or her work.

Significantly, this subcommittee evidenced its aversion to government-mandated labeling based on content during last year's hearings under former Chairman Kastenmeier on the Foreign Agents Registration Act. That Act permits the U.S. Department of Justice to require that certain foreign-produced films and videos be labeled as "propaganda" before they can be distributed in this country. As the American Library Association observed in its testimony, "a label is a label, and governmentally mandated labels affixed to expressive materials are counter to the principles of librarianship and the spirit of the First Amendment."

While the National Film Preservation Act of 1988 was fraught with problems, pitfalls and ambiguities, AMPTP and MPAA commend the efforts of the Librarian of Congress, Dr. Jim Billington, in administering the Act. He and his staff -- including Winston Tabb and Eric Schwartz -- managed potentially controversial and divisive issues in a way that kept the energies of all Board members and other interested parties properly focused on constructive ways to preserve America's film heritage. As a direct result of Dr. Billington's leadership, Board members recommended that he suggest a revised law more directly focused on coordinating and expanding current film preservation efforts.

As Chairman Hughes noted when he introduced H.R. 2372, which includes the Librarian of Congress' proposal for reauthorizing the Film Preservation Board, the 1988 law implicated essential copyright principles and should not have been hurried into law as a legislative amendment to an appropriations bill. We support the Chairman's determination to focus squarely on film preservation, and welcome a thorough review of any related issues by the committee with expertise in the intricacies of the copyright law and the First Amendment. We note that Chairman Brooks expressed similar sentiment in a 1988 statement about the Act. (September 9, 1988 *Congressional Record* at E2885).

The MPAA member companies strongly support the Librarian's film preservation goals. With equal strength, MPAA opposes any legislative effort to require labeling of motion pictures. In the words of Congressman Vic Fazio, chairman of the House Appropriations Subcommittee that oversees the Library: "film preservation is consistent with the Library's overall mission, [and the Librarian's proposal] makes it possible for the Library to turn its energy and resources to the most pressing concern facing America's film history: the physical deterioration of film stock."

Private Sector Film Preservation Initiatives

The purported purpose of the National Film Registry created by the 1988 Act was to ensure that certain films deemed by the Librarian to be culturally, historically or aesthetically significant would be preserved.

It is noteworthy that MPAA member companies, plus the Turner Entertainment Company -- not an MPAA member company but the owner of a major film library -- combine to own the copyright in well over half of the first 50 films selected for the Registry and needed no special incentive to preserve these films.

Virtually every one of the MPAA and Turner films had been meticulously preserved long before they were ever entered in the Registry. The copyright owners had cleaned them, restored them, improved damaged sections of the film within the limits of technology, transferred these films to safety stock, and safely tucked away a "master copy" (or "master negative") in a climate-controlled vault. New film prints can be made at any time from the preserved "master copy" -- so these films can be enjoyed by future generations.

Granted, the past record in this area is not spotless. In past decades, films were neglected -- even mistreated or destroyed. But those were different times, when film was considered simply an entertainment medium with little or no future value.

The MPAA and its member companies undertake, financially support, or otherwise assist outside programs to advance film preservation in America. Their intensive and constantly expanding "in-house" programs develop, implement, and fund the preservation of extensive libraries. Meanwhile, films that are no longer protected by copyright -- "public domain" works -- and films owned by collectors who cannot properly store them remain at great risk.

Today, with attention to preservation technology, and the constant expansion of ancillary markets for films, the major studios are making a continuing commitment to preservation. With the near-universal availability of VCRs, and the growth of cable and satellite TV, studio libraries have become invaluable assets. Consequently, each and every MPAA member company is spending millions of dollars every year to preserve its inventory.

Chances are you have read about -- or seen for yourself -- the fruits of their efforts: Universal's recent rerelease of Spartacus, Columbia's remarkable work on Lawrence of Arabia, and the efforts of Turner Entertainment on Gone with the Wind and the recently restored and rereleased Citizen Kane, distributed by Paramount.

But preservation efforts do not extend only to feature films. TV shows, cartoons, and other film materials are also being preserved, every day, by the private sector.

It is noteworthy that the major studios are also expending great resources preserving their new releases. They have learned from their experiences, and want to make sure that they won't have to go through this exercise with Ghost, or Home Alone, or Pretty Woman thirty years from now.

Attached in an appendix are some recent articles discussing some of the studios' substantial film preservation efforts, such as:

> Paramount's construction of a recently opened 40,000 square-foot state-of-the-art archive building, with a computer data base listing a half-million items cataloguing cans of film, reels of videotape, and magnetic film and tape for audio records.
>
> Warner Bros.' work on an extensive, multi-million dollar film restoration project that has to date breathed new life into 26 classic films including East of Eden, Rebel Without a Cause, and A Streetcar Named Desire.
>
> Fox's 51,000 square-foot Hollywood storage vault rebuilt in 1983 for maintaining more than 3,000 feature films and 3,000 to 4,000 filmed series episodes.

Columbia's year-old Film and Tape Preservation Committee comprised of representatives of America's leading film preservation organizations -- created to work on a national level on film and tape preservation and restoration policies and manage major film preservation activities associated with Columbia's own filmed entertainment library.

Disney's three-year restoration of Fantasia -- and ongoing work on 1500 feature films and 500 cartoons.

MCA's million dollar restoration and rerelease of Spartacus -- in addition to caring for its 3,000 feature films and 17,000 television series episodes and movies.

Let there be no doubt that much of America's film history is in good hands. Given the demonstrated value of film libraries, it makes no sense for copyright owners not to care for them.

Title III of H.R. 2372

MPAA and AMPTP support the Librarian's film preservation goals, and the principle of preservation embodied of Title III of H.R. 2372. However, there are important aspects of the bill that we believe require the Subcommittee's attention before approval.

For instance, several issues are raised by the language in Section 304(a)(2)(C) of the bill, which states:

> The Librarian shall provide a seal to indicate that a film has been included in the National Film Registry as an enduring part of the national cultural heritage of the United States. Such seal may then be used on copies of such films that are original and complete versions as they were first published, after such copies have been examined and approved by the Librarian.

a) "original and complete" -- Permitting a government body to brand a particular version of a work as "original and complete" can lead to consumer confusion. For instance, the rereleased versions of Lawrence of Arabia and Spartacus included footage that did not appear in the original theatrical release but which, in the minds of some fans, made these versions more "complete" than the "original."

While it might not be necessary to modify the text of the definition of "original and complete" contained in Section 312(5) of H.R. 2372, the term itself is misleading.

Rather than invite unnecessary confusion, we recommend that another term be used to reflect the fact that the version one is viewing has been preserved. The terms "preserved film," "restored film," or "Registry version of a film" may suffice.

b) "copies of such films" -- The Librarian's proposal would permit a copyright owner to apply the Registry seal to a film print -- the medium used in movie theaters -- and would not permit use of the seal on a videotape, laser disc, or other copy of a film. The purpose of this Act, after all, is film preservation, so the terms of the Act should necessarily apply only to films as they may be distributed on film stock.

The text of the bill is not easy to understand, and should be revised to specify that the seal may only be applied to "film prints" or "copies on film stock."

c) "examined and approved by the Librarian" -- As written, the bill appears to require the Librarian to inspect every copy of every film print to which a copyright owner desires to affix a seal. This is surely unintended, and should be revised to permit the Librarian to review a representative print.

Taking account of the three concerns expressed, MPAA and AMPTP recommends that the second sentence of the paragraph reprinted above be changed to read:

> ...Such seal may then be used on a film print of a title selected for the Registry, provided that the film print is identical to the "preserved film" previously approved by the Librarian.

* * *

Section 304(a)(2)(C) goes on to declare:

> In the case of copyrighted works, only the copyright owner, a duly authorized licensee, or the Librarian or an archive other than the Library of Congress may place a seal on a copy of a film selected for inclusion in the National Film Registry. Wherever appropriate, the Librarian may accompany the seal with language indicating that a copy of a film was preserved and restored by the Librarian or by an archive acting under the standards issued under subparagraph (D).

d) who may "place a Seal" -- MPAA and AMPTP will not object to the Seal created by this bill because its use is entirely voluntary -- a copyright owner has the right to use it, or to choose not to use it.

However, we feel strongly that only the copyright owner should have the authority to place a seal on a copy of a film, or to grant authority for another to do so. To do otherwise is contrary to the spirit, and probably the letter, of our copyright law.

In addition, the bill would include an "archive" among those empowered to apply the Registry seal to a film without defining what constitutes an "archive." Could any film enthusiast or collector declare himself an "archive?"

We recommend that this section be revised to require the copyright owner's approval before a seal may be applied to a copy of his or her work, and to permit the Librarian to place the seal on a copy of a Registry film only if (i) the film is in the public domain, or (ii) the copyright owner has expressly authorized the Librarian to apply the seal.

e) Librarian's discretion to "accompany the seal with language" -- We oppose the concept of a government official's having discretion to promulgate recommended or mandatory wording.

We believe all interests would be far better served if the statute prescribed appropriate wording that should be a part of the Registry seal. We recommend "Library of Congress / National Film Registry / Preserved as part of the National Film Preservation Act."

f) preservation "standards" -- This bill instructs the Librarian to publish in the Federal Register standards for preservation or restoration of films. The statute offers minimal guidance. In addition, the bill does not provide for public notice, opportunity for comment, or other procedural protections. This is very troubling.

In our consultations with film preservation experts, we ascertained that it would be difficult to craft a workable set of "standards." Each preservation project presents unique problems and challenges, and with every passing year film preservation technologies change and advance.

We believe the better course would be for the Congress to incorporate broad, workable preservation objectives in the statute. The quality of any particular preservation effort will be self-evident, so the Librarian should have no difficulty in determining which prints of a film qualify for a Registry seal.

g) membership of the National Film Preservation Board -- Discussions at the meeting of the National Film Preservation Board, as originally constituted under the 1988 Act, flourished as a result of the different ideas and diverse perspectives brought to the table.

MPAA supports the Librarian's proposal to expand the membership of the Board, and we encourage the Congress to authorize expansion to include representatives of the broad variety of disciplines relevant to film preservation.

For instance, the insights of those whose companies manufacture film stock, those who produce the tools and materials used to preserve films, and those who manage the studios' preservation projects would be of great value to the Board and, we believe, to the Librarian.

Representatives of these interests -- the people who understand the technical, economic and practical challenges of film preservation -- will contribute immensely to the Board's value as an advisory body on film preservation.

Conclusion

The Librarian's proposal for a National Film Preservation Act which clearly focuses on the important task of film preservation is commendable, and AMPTP and MPAA support the principle of preservation embodied in Title III.

It is critically important, as Chairman Hughes said in his remarks introducing the measure, not to let the focus of this bill shift away from the universally-supportable goal of preserving our vanishing film heritage. Every effort should be made to ensure that the energies, talents and resources of the Librarian and the National Film Preservation Board are directed to the extraordinary challenge of ensuring that the fragile fruits of our cinematic history -- particularly the "public domain" and other works that are being neglected -- are maintained for future generations to enjoy.

The AMPTP represents over 200 producers of TV programs and motion pictures, such as: Aaron Spelling Productions; The Burbank Studios; Columbia Pictures Entertainment Inc.; Embassy Television, Inc.; Four Star International Inc.; Hanna-Barbera Productions Inc.; Lorimar-Telepictures; MGM-Pathe Communications Co.; MTM Enterprises; Orion Television, Inc.; Paramount Pictures Corp.; Ray Stark Productions; Stephen J. Cannell Productions; Sunrise Productions, Inc.; Twentieth Century Fox Film Corp.; Universal City Studios, Inc.; Viacom Productions, Inc.; Warner Bros. Inc.; Walt Disney Pictures Inc.; and Witt/Thomas/Harris Productions.

The MPAA member companies are: Buena Vista Pictures Distribution, Inc.; Columbia Pictures Entertainment Inc.; MGM-Pathe Communications Co.; Orion Pictures Corporation; Paramount Pictures Corp.; Twentieth Century Fox Film Corp.; Universal City Studios, Inc.; Warner Bros. Inc.;

'Spartacus': A Classic Restored

By RICHARD BERNSTEIN

Some critics dismissed it as a multi-million-dollar costume spectacular and indeed numerous museums and costume houses provided several thousand uniforms and seven tons of custom-made armor for assorted senators, generals, gladiators and 5,000 soldiers played by real soldiers from the Spanish Army.

Bosley Crowther of The New York Times, summing up a certain disdain for the sprawling biblical epics popular at the time ("Ben-Hur" and "The Ten Commandments" were others) called it "heroic humbug — a vast, panoramic display of synthetic Rome and Romans."

But that was 30 years ago. Since then "Spartacus," the story of a Roman slave rebellion starring Kirk Douglas, Laurence Olivier, Tony Curtis, Jean Simmons, Peter Ustinov and Charles Laughton and directed by Stanley Kubrick, has achieved a certain vaguely camp status. For the huge numbers of actors in its vast battle scenes, for its depictions of gladiatorial combat (fought by 187 specially trained stuntmen) and its depictions of the pomp of ancient Rome, the film is viewed by many in the movie business as an American classic, a historic production. It is a staple of video rental stores and of late-night television; its most famous line — "I'm Spartacus" — is familiar to entire generations.

Universal-International

Kirk Douglas in "Spartacus," which has been restored for new release.

False Impression

The problem with it, until now, has been that the prints shown on television or used in video reproductions were badly ravaged by time: scratchy, distorted and faded.

But starting with a special New York premiere on Sunday, audiences will be able to see "Spartacus" in all its original splendor — even with some 10 minutes of once elided, sometimes controversial scenes back in. The revival, planned for theaters across the country for April 27, comes after a nine-month restoration effort sponsored by Universal Pictures and the American Film Institute. It is aimed, the project's leaders say, at saving a great and historically important American motion picture from celluloid oblivion.

"It's about time it was done," said Mr. Douglas, who not only played the slave leader Spartacus on screen but also produced the movie, which was adapted from a novel by Howard Fast. "Whenever I saw it on TV, I turned it off immediately, the way it was chopped up and the color distorted.

"Up to that time, it was the biggest picture made in Hollywood," said Mr. Douglas, speaking by telephone from Los Angeles. "What I'm proud of is that there are many big spectacle pictures but in this one the actors, the characters, are bigger than the background."

Historically Important

One of the purposes of the American Film Institute is film preservation, and the institute's president, Jean Firstenberg, listed several elements of "Spartacus" that give it historic importance.

It was an early film by Mr. Kubrick, the director who later went on to great celebrity with such films as "2001: A Space Odyssey" and "A Clockwork Orange." Mr. Douglas hired a blacklisted writer, Dalton

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A Longer, Shinier 'Spartacus'

Continued From Page C15

Trumbo, to write the screenplay, thereby effectively destroying blacklisting. And it put on screen a rare collection of legendary performers whose collective dazzle, given current movie salaries, would be difficult to match today ("Spartacus" cost $12 million to make in 1960, the rough equivalent of $100 million today).

"One of the questions about films is whether they stand the test of time," Ms. Firstenberg said. "Audiences will now have the opportunity to decide whether 'Spartacus' stands the test or not, and I think they'll decide that it does."

The restoration of "Spartacus," which follows similar efforts made in recent years with Abel Gance's "Napoleon" and David Lean's "Lawrence of Arabia," was made necessary by the simple physics of film, which inevitably shrinks and loses its color as time passes. But there were several special problems with "Spartacus."

2,000 Cans of Outtakes

For one thing, the team of some 30 restorers who worked on the film at Universal had to find the footage that had ended up on the cutting-room floor. It was believed that all of the cuts had been ordered destroyed some 15 years ago. Nonetheless, there were in Universal's giant vaults some 2,000 canisters of "Spartacus" footage that had lain around for 30 years, and some of the cut material was found in an an exhaustive search of those canisters. Additional footage was provided by collectors.

The most controversial cut concerned what the film restorers refer to as the snails and oysters scene, in which Olivier attempts the seduction of Tony Curtis in a Roman bathhouse. In the scene, Olivier asks Mr. Curtis if he likes oysters, then if he likes snails; some people, he says, like both.

The four-minute scene was removed from the original 197-minute version of "Spartacus" at the demand of the New York Legion of Decency, a Roman Catholic group that monitored movies for what it deemed obscene. The full film as originally made by Mr. Kubrick was shown to two preview audiences, but everyone else saw the movie with the homoerotic scene taken out.

A Substitute Voice

Jim Katz, who supervised the restoration, which cost almost one million dollars, said in a telephone interview that while footage of the cut scene was found in the Universal vault, there was no soundtrack at all; it had to be redone. Tony Curtis went to Universal to reread his lines. In London, with Mr. Kubrick directing by telecopier, the British actor Anthony Hopkins read the lines of Olivier, who died in 1989.

"This picture really got butchered over the years," Mr. Katz said, speaking not only of the elimination of the snails and oyster scene but also of a series of cuts made to reduce the film's length from 197 to 160 minutes. "It's going to be presented for the first time the way it was made."

A full day's work for every four minutes of film.

The actual restoration work was slow and painstaking, involving the separate reconstruction of each of the roughly 256,000 frames of the movie. Robert Harris, a producer who oversaw the technical work, said that with crews working full time, the restoration work progressed at the rate of about four minutes of film for each full day's work.

The Long Way Round

The original camera negative of "Spartacus," the actual film shot by Mr. Kubrick from which duplicates were made, was in such bad condition that it was unusable. Instead, technicians on the project used the black-and-white color separation negatives that were often made as backup. The separation negatives were made by exposing black and white film through different filters — blue, green and red — to record all of the color information in the movie on non-fading black and white stock.

So in a sense, "Spartacus" was reconstructed by reversing the process with which the color separation negatives were made. Color stock was put into a camera and exposed three times, once for each of the color separation strips, with roughly two hours required for each shot.

"Basically, what we're dealing with is an imperfect process to deal with an imperfect art," Mr. Harris said. "But I think we've been reasonably successful. I think it will look quite good on the screen."

Mr. Douglas was more enthusiastic. "I haven't seen the whole thing yet," he said, "but I've seen a few segments, and they look spectacular."

Studio Mounts Re-Release Campaign Following Program To Restore Tv, Pic Classics

By JOSEPH McBRIDE

Over the last 2½ years, Par has quietly been accelerating the preservation of its film and tv holdings — what it calls its "Asset Protection Program" — including a computerized bar-coded inventory of nearly 200,000 cans of material, the storage of precious film and tape masters in an underground vault near Pittsburgh and the construction of a new archive building on the studio lot to house a duplicate set of masters.

Planned for opening June 1, "The Archive," as the studio building will be called, will be under the curatorship of studio library resources director Milt Shefter. It has been under construction since September in the area behind the landmark blue-sky backdrop, which has been removed temporarily to install a climate-control system but will be reattached to the facade.

Par exes declined to specify a pricetag for the 40,000-square-foot studio archive, the climate-controlled vault it has built in the Pennsylvania commercial storage facilities, or for its other preservation efforts, but costs are said to be substantial.

The costs will be more than offset, Par believes, by the savings expected from a longer shelf life for prints, more efficient retrieval and processing procedures, and all of the tangible and intangible benefits to be reaped from systematic preservation and usage of its heritage. Par also declined to break down dollar figures on those revenues.

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As part of its ongoing preservation and restoration program, Par over the last couple of years also has been striking pristine new prints of hundreds of its classic film titles, and about a year ago took back 35m distribution of its classics from Films Inc. (which still has 16m rights) to ensure better quality control of theatrical revivals under the stewardship of repertory distribution chief Michael Schlesinger.

A Par spokeswoman said the studio wants to "share its treasures with today's moviegoing public — not only preserve them, but share them, in the theatrical, video and tv markets. Paramount is leading the way to create a model (industry program), and it's all coming together at the same time."

As public showcases for its preservation efforts, Par is ballyhooing revivals of new prints of Stanley Donen's 1957 Fred Astaire-Audrey Hepburn musical "Funny Face" and Cecil B. DeMille's 1956 Bible epic "The Ten Commandments."

These and other titles were chosen after consultation with rep houses around the country, but with the hope that they will also click with the "mainstream" public, Schlesinger said.

"Funny Face," which has already begun playing other cities, will close the AFI Los Angeles Film Festival at an invitational gala Thursday at the Cineplex Odeon Century Plaza before starting a one-week run on the following day at the AMC Century 14.

"Commandments" opens May 18 at the Cinerama Dome in 70m, and simultaneously in 35m at the Crest in Westwood.

Among the many other pix for which Par has recently struck new prints are Billy Wilder's "Sunset Boulevard" (1950), Preston Sturges' "The Miracle Of Morgan's Creek" (1944), William Wyler's "Roman Holiday" (1953), John Ford's "The Man Who Shot Liberty Valance" (1962) and Peter Bogdanovich's little-seen first feature, "Targets" (1968), as well as numerous RKO titles for which it has domestic theatrical rights, including the Astaire-Ginger Rogers tuner "Top Hat" (1935) and Nicholas Ray's 1947 "They Live By Night."

Other Par pix with new prints also include "The Buccaneer" (1938), "The File On Thelma Jordan" (1949), "Here Comes The Groom" (1951), "Sabrina" (1954), "White Christmas" (1954), "The Desperate Hours" (1955), "Gunfight At The O.K. Corral" (1957), "Breakfast At Tiffany's" (1961), "Hud" (1963), "The Spy Who Came In From The Cold" (1965), "Seconds" (1966) and "The Duellists" (1977).

A major celebration is being planned around next year's 50th anniversary of the release of Orson Welles' "Citizen Kane," which, like the rest of the RKO library, is owned by Turner Entertainment, which pacted with Par for theatrical distribution last Fall.

Par emphasizes that these and other highly publicized titles are only a sampling of the large inventory available to rep houses and others showing 35m prints.

Video Series

In the vidtape market, Paramount Home Video is prepping a "Directors' Series" of w.k. films released with additional footage and interviews with the directors.

Among the films, Adrian Lyne's "Fatal Attraction" (1987) will be released on tape with its original ending included, Bogdanovich's "Paper Moon" (1973) tape will include outtakes, and Leonard Nimoy's "Star Trek IV: The Voyage Home" (1986) tape will include additional footage.

Par also points with pride to the release in February by its homevid division of "Indiana Jones And The Last Crusade" in seven separate formats — VHS, Beta, letterboxed Super VHS, VHS in Spanish, letterboxed laser disc, panned & scanned laser disc and 8m, the first time the public has had such a wide array of format choices simultaneously for a new release.

Although Par boasts that it is unusual among Hollywood studios for its practice since 1933 of having made YCM (yellow, cyan and magenta) separation protection masters for all of its films, rather than only for selected titles, not all of the studio's films still exist or are still owned by Par.

"There was a company policy to destroy silent films at one time, because it was thought that silent films had no commercial value," noted Paul Spehr, assistant chief of the motion picture, broadcasting and recorded sound division of the Library of Congress.

But more than 100 Par silents did survive, he said, "mostly because there were people in the vault who did not have the heart to throw them away," and that ironically ensured that Par today can claim to have

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Par Restores Film, Tv Classics In Massive Preservation Program

more of its silents than virtually any other company.

Such historic titles as Sarah Bernhardt's "Queen Elizabeth" (1912, imported from France by Par's predecessor, Famous Players), DeMille and Jesse Lasky's "The Squaw Man" (1914) and James Cruze's "The Covered Wagon" (1923) survive, but such other important works as Cruze's "Hollywood" (1923) and Ernst Lubitsch's "The Patriot" (1928, with music and sound effects) have been lost.

Most of the studio's pre-1948 sound library was sold to MCA in the 1950s, "and Par through flukes" retains ownership on only a few titles from that era, mostly through underlying rights, such as "The Miracle Of Morgan's Creek," the only Sturges film it still owns. Studio prints on most Par films from that era are housed at the UCLA Film & Television Archive and at the Library of Congress, but MCA retains the negs and printing materials.

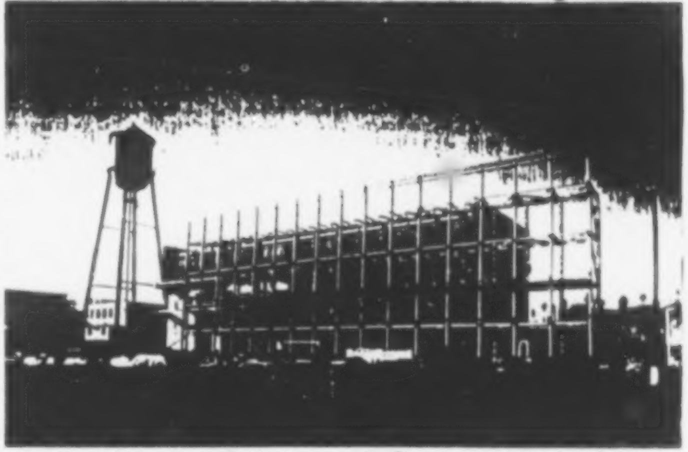
Of the pix controlled by MCA, "a lot of those are in very bad shape," and even such cinematic landmarks as Josef Von Sternberg's "Morocco" (1930) and "The Scarlet Empress" (1934) have had preservation problems, Spehr noted. He added that MCA U's preservation program also has improved in recent years, and "the people who are responsible now have a real consciousness to try to save the product."

The industry in general has made considerable strides since the advent of cable and tape made studios realize the profit potential of their film libraries, Spehr noted.

"I have been dealing with (Hollywood studios) for 25-30 years, and the awareness of the value of the older film product is at its highest level. There is still a great deal of improvement that can be made in the whole preservation program ... (but) the quality of preservation work in the 1980s and 1990s is vastly superior to that being done a generation ago."

What are being preserved by Par now, in addition to the remaining silents, primarily are the pix made after 1948, up through such recent pix as "The Godfather" films and "The Hunt For Red October," as well as the studio's voluminous tv output, including "Star Trek" and "Entertainment Tonight," with its collection of 85,000 interview and show tapes.

The current Asset Protection program was accelerated after Robert Sheehan, senior v.p. of the Par TV group, read a 1987 Los Angeles



"The Archive," Paramount's new building to house precious film and tape masters on the studio lot, is seen in its current phase of construction, with the framework of the landmark blue-sky backdrop visible on its facade. The backdrop has been temporarily removed and will be replaced in time for the slated opening June 1.

Paramount photo

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Times article on the highly secure underground storage facilities used away from Hollywood by other companies, and realized Par was at a disadvantage having its negatives and print materials stored in antiquated studio basement vaults, in N.Y. area vaults and scattered around L.A. in labs not under Par's direct control.

Paramount Pictures chairman and chief executive officer Frank G. Mancuso, who stepped into his post in 1984, was already committed to refurbishing the original architecture of the Hollywood lot. He also named buildings after such great names of Par's past as Sturges, De Mille, Lubitsch, Wilder, Adolph Zukor, B.P. Schulberg and Hal Wallis, and Par has been honored by the Los Angeles Conservancy for its efforts to preserve its historic buildings.

Mancuso was keenly aware of the importance and the value of preserving its library as well.

"The independent (archival) institutions are important to maintaining the history of Hollywood," Mancuso said in a statement yesterday. "However, I truly believe the responsibility of restoration and archival continuance belongs with the studios themselves.

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"Therefore, we at Paramount some five years ago set off on a program that preserves yesterday and today for tomorrow."

At Mancuso's direction, a study was begun in the Fall of 1987 by Sheehan, tv operations group v.p. Phil Murphy, Shefter and others of steps needed to upgrade studio preservation efforts. All of the material owned by the studio was identified and bar-coded, and the process was begun of retrieving it and identifying preservation needs.

The underground storage area near Pittsburgh — an abandoned limestone mine also used by the Library of Congress, the U.S. Patent Office and various corporations — was chosen for Par's private Eastern vault in 1988, and operation began in January 1989.

It was at the same time that Par began evaluating, repairing and remastering its film and tape holdings for storage. Still underway is a program of inventorying and retrieving Par's holdings in Europe, estimated at about 5% of its total library.

Film elements are stored in the Pennsylvania vault sans titles but bar-coded under armed security, housed in special acid-free containers built to Library of Congress specs. Environmental controls keep the films under cold storage and reduce the impact of humidity and other atmospheric conditions.

Some 270-300 reels of pre-print elements — including the camera neg, YCM masters, color master positives, dupe negs and soundtrack material — are stored for each film. A complete duplicate set will be housed for each title in the studio archive, the Par spokeswoman said.

Rather than having its air conditioning, heating and generator systems on the roof like most buildings, the archive will have those facilities inside the blue-sky framework to keep the building watertight and ensure state-of-the-art environmental controls.

The building will have an operational staff of 10 people working under Shefter, and will also house the studio's ancillary markets editors.

As for vidtape, whose ultimate shelf life is still the topic of scientific debate, Par has adopted a policy of examining each of its tapes for possible copying every four and a half years, a conservative time frame to guard against deterioration.

Since 1987, beginning with the Annette Funicello-Frankie Avalon musical "Back To The Beach," all Par feature films are also stored for protection purposes on digital tape, and the same has been done with tv shows since then. Digital storage, considered a possibly revolutionary method for lengthening the survivability of films and tv shows, is still in its developmental stages, however.

Despite all of the recent efforts, the stark fact remains that Par, like all other film owners, is "fighting time to get to this stuff before it deteriorates," as Shefter puts it.

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Post.

Rebel Without a Cause:
Warner Bros. restores
22 movie classics with
Chace Surround Sound
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Restoring a *Rebel's* faded glory

By MARY MARVIN

HOLLYWOOD, CA—From the classic *Rebel Without a Cause* to the rarely seen *Helen of Troy*, Warner Bros. has embarked on a massive project to restore stereo versions of at least 22 feature films made during the 1950's and early '60's. It's a project that until about two years ago would have been unthinkable. Throughout the 1950's, Warner Bros. routinely destroyed stereo masters of its feature films. At the time, it seemed a logical part of the operation. Home video and stereo television weren't even on the drawing board yet, and television broadcast seemed to represent the only apparent future for the Warner Bros. library of motion pictures.

Mike Piastrelli and Rick Chase synchronizing and mixing *Rebel Without a Cause*.

One of the ideas for using stereo sound in motion pictures in the 1950's was to draw the television audience into the movie theaters," says Michael Arick, director of asset management at Warner Bros. Inc. "The stereo master was used to prepare a certain number of prints which ran in the theaters for awhile and then that was the end of it. So, for studios, the only life for a film after it had its theatrical play would either be to make another print for theaters or a 16mm print for television syndicated distribution. They didn't anticipate, since television intended to be the last home for these films, that stereo would ever have a market outside the initial theatrical release. The stereo master was just another master they had to store, another byproduct that was discarded, as many are in the process."

It was around the late 1960's that the studio realized the stereo masters from the previous decade had been destroyed, continues Arick. "I think the case here at Warner Bros., even though it is a pioneer in sound, was a little more extreme than it was at other studios where you'll find that they kept certain stereo masters. At Warner Bros., it was across the board. Everything from that period (from the early 1950's until the early 1960's when Warner Bros. began preserving the stereo masters) was found to be missing. It was just accepted as a very sad fact and no one expected to see any of these stereo titles back again."

Although the stereo masters were gone, Arick had learned that many of the remaining Cinemascope prints made from missing masters were in the hands of a number of private collectors. "In some cases, these prints were the only remaining traces of the stereo," he says. Until recently, however, most collectors were unwilling to part with their prints, even for a short time. "Collectors are very notorious about the collections. When a studio would approach them, especially back in the paranoid '70's when the FBI was out chasing collectors (because of copyright and right to ownership issues), it was unlikely that a collector would let a studio borrow a print." And, even if a collector had been willing to lend a print to the studio, the technology wasn't yet in place to prepare a new stereo master for the film from a less than perfect print.

That all changed recently, says Arick. Two concurrent events made it possible to create complete, restored stereo masters of Warner motion pictures such as *East of Eden*, *Rebel Without a Cause* and *Pete Kelly's Blues*. The first key change was a more relaxed attitude on the part of collectors, who no longer were as concerned about acknowledging possession of a feature film print. Warner Bros. helped erase whatever lingering doubt collectors might have had about loan-

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Chace Productions patented Chace Surround Stereo in 1988.

***Rebel:* If it was played every week – you're out of luck."**

ing their films to the studio by drawing up contracts that guaranteed anonymity and ownership to each collector.

"I happened to be working on a project for the British Film Institute when I ran across a number of stereo prints at the Library of Congress and through several private collectors," says Arick. "I approached Warner Bros. and asked them if they would be interested in working on a series of contracts that would guarantee the private collector that he would not lose his print if he let Warner Bros. borrow it."

Since beginning his search two years ago, Arick has tracked down 28 prints representing 22 different feature films. He is still looking for another five to seven feature films from the same period. Most of the reels of film discovered so far are in relatively good shape, due in part to the care taken by the collectors and, ironically, to the physical characteristics of the soundtrack itself.

"When the film was wound around the reels and stored, the four ridges that made the tracks on them allowed some air to get in," explains Arick. "So while a lot of films from that period might be in advanced stages of warpage, the tracks helped prevent that problem. "On the other hand, a print with a magnetic track was more susceptible to wear through a projector. So it's kind of a trade off. If you have a print that was stored for a long period of time and not touched, that's great. If it belonged to a collector who played it every week, you're out of luck."

"Private collectors are very notorious about their collections."

But even the cinemascope prints that are in good condition have soundtracks that are incomplete when compared to a full-length negative. Beginnings and ends of reels are sometimes short, cutting off lines of dialogue at reel changes. The prints also have splices where the film was repaired. So restoring a complete stereo master called for more than just locating, transfering and cleaning up the soundtracks from the remaining stereo prints. There had to be a way to regenerate stereo sound for the missing or broken sections. The problem was that the only complete and intact soundtrack source was the monaural master, which had been preserved by Warner Bros. (the picture negatives were also preserved by the studio). It was at that point that Chace Productions and its patented Chace Surround Stereo came into play.

Located in Hollywood, Chace productions is an audio facility for video, film and broadcast that was founded in 1982 by Rick Chace. Its major clients include Paramount Pictures, 20th Century Fox, MGM-UA and Orion Pictures. In 1985, Chace began working on Chace Surround Stereo, a computerbased system that received a patent in 1988. "When stereo television came in in late 1984, early 1985, I got an idea for an invention that would let us very carefully program monaural soundtracks into full, dimensional stereo surround," says Chace, president of Chace Productions.

Among other projects, the system was used to create stereo versions from the monaural soundtracks for Warner Bros. *Rebel Without a Cause*, *East of Eden*, and *Giant*. It was this earlier work for Warner Bros. that helped lead to the company's involvement with the restoration of the stereo feature films, says Arick, noting that an overheard conversation in a video store about the Chace stereo versions of the James Dean movies may have been one of the catalysts.

"I remember standing in a video store listening to people say, 'Gee, I wish this was in the real stereo,' and someone else saying that the stereo versions don't exist anymore — so, this is the best we have. Then they got into discussing the merits of the Chace Stereo and how much it sounded like the original based on their recollections," says Arick, who credits Peter Gardiner, vice president, corporate film video services at Warner Bros., with immediate and enthusiastic support for the restoration project.

The manufactured stereo soundtracks for the three James Dean movies were done about five years ago. The current and ongoing Warner Bros. project started about 18 months ago, and, emphasizes Chace, is primarily a *restoration* of the stereo from the soundtracks of the recovered Cinemascope prints.

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East of Eden:
"an incredible film and very early stereo sound mix."

combined with some stereo created from the monaural soundtrack for the missing sections of film. Chace Productions not only cleans up the soundtracks, repairs the missing sections using the unique Chace Surround Stereo, but also matrixes the four magnetic tracks to two tracks, using its patented system.

"Once we have the soundtrack over here we do two things," says Chace. "We clean it as best we can and then we restore the missing pieces. prints get played, they break and when they're spliced back together a few frames may be gone. What we do is take the stereo from the prints and the mono track and, using our stereo process, sew together a new, seamless four-track stereo soundtrack. We put it together so it plays fundamentally the way it played in its original version, and where damage has been done over the years, we've restored it in a way that is as seemless and unnoticeable as possible."

Once the films are located and created for use by the studio, the [illegible] transferring the soundtrack from the print. Because it has been about 30 years since that stereo format was used, Chace had to order special heads and pre amps to play the four-stripe Cinemascope prints. The four tracks of the magnetic print are first transferred by Tom Long at Chace over to 35mm polyester fullcoat magnetic stock. "It has very wide, deep tracks," says Chace. "It's very robust compared to the thin tracks that are used on the 35mm print. When we have the soundtrack from the print transferred to the full coat, we can really work with it."

The full coat four track copy is run against the reference monaural track supplied by Warner Bros. to find out where there are missing sections. "Everything must sync up to the monaural track because it's what would have been used to make new prints. Once we know where the missing sections are we check to see whether they are monaural or stereo. Then we decide how to build each section. We also have to figure out how to get back and fourth between the various elements in case they have different levels recorded or different hiss levels."

"When they mix a movie in stereo, they may have 30 or 40 individual soundtrack elements running at a time," continues Chace. "That makes it easy to make up stereo from mono—you can pan the car to the left, leave the dialogue where it is, bring in a helicopter from the front of the theater to the back. The trick, if it's all mixed together already, is to figure out how you can take it apart, separate it enough to begin to move those elements the same way a theatrical mixer did before they were combined."

Chace, who is understandably vague about the specifics of his inventive process, describes it as "a labor intensive situation." "Chace Surround Stereo is not a black box into which one runs mono and gets stereo. You go through things frame by frame and figure out exactly what to do. The stereo processor is a wonderful thing, but it's the people who are involved who are getting it done right. The system is one of the tools we use, but good mixing techniques, proper attention to audio details, decent ears and good feedback from the client and purists and collectors that we know is making this project what it is."

The process takes place in the Chace online room with three people—the chief mixer, a person in charge of synchronization and the director (Rick Chace). Each feature film usually requires about three 12 ½ hour days before the soundtrack is played for Warner Bros for final suggestions or changes. "Because Mike does his job very well and the collectors care about their prints, we don't have great hunks missing that we have to turn into stereo," says Chace. "We find typically that you might have the beginning or end of a reel that is missing — a few seconds because it broke off — or you might have a break somewhere so they're 12 or 13 frames missing. It isn't a case of having to take a big musical number and make it into

Rebel's **decision "not to modernize the sound."**

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stereo.

"There are multiple options for fixing each break," adds Arick. "It really takes a lot of expertise and brainstorming on the part of Chace Productions to figure out what is going to work in each case."

"They all have their individual horrors," says Chace. "If, for example, the monaural version is only from an optical track it's very hard to get that soundtrack to match anything magnetic."

In the case of a missing section in *Pete Kelly's Blues* (directed by and starring Jack Webb), one of the biggest challenges was to restore an eight frame break in the film that occurred right in the middle of a scene. Although the scene had both dialogue and music, only the music was missing in the break, says Chace. "You sit in the studio, you stop everything, scratch your head and look at your mates. And you ask yourself, what can we do here to keep the maximum amount of stereo in this scene because we have to do something for those eight frames. Even with Chace Surround Stereo we can't produce the same stereo that Warner Bros. produced when they recorded a live band on 35mm film with three tracks."

Because Chace has always been a fan of the soundtrack to *Pete Kelly's Blues*, it was especially important to him to preserve as much of the original as possible. "One solution would have been to take the scene and put the mono in instead of the stereo, but if I were the buyer of the laser disc or a viewer of the film in the audience, I would say, 'Gee, it should have been in stereo here, and they took the easy way out.' So what are you going to do?"

"In *Pete Kelly's Blues* we were saved by a sound effect. A car drove by and in the middle of the drive was the break. So mostly what you hear there was the car in monaural. It didn't pan by, it was in the center speaker. So for that brief moment we could cross fade to the monaural soundtrack and once the car got by we went back to the stereo track."

The cross fade required a total of eight seconds to fade into the mono and back to the stereo. "If I tried to suddenly punch in eight frames of mono, you would hear it collapse to mono for eight frames and then pop back to stereo. As the car came in it became the dominant piece of audio. While we were in the mono track, the computer synced back up the stereo track and then we went back to that track and put in the stereo gradually.

Rebel: "We're down to the last few prints on some of these films."

Warner Bros. and Chace Productions (with the aid of many helpful film collectors) refurbish a slate of movie classics in stereo.

This took place in about eight seconds. Six hands and six ears and about ten tries until you couldn't hear it happening."

In addition to repairing broken or missing sections of a print, missing sections of individual channels due to oxide flaking off over the years are repaired using transfers from second prints and from mono processed for stereo. Rumble, hiss, screech and other noise artifacts are removed or minimized without affecting high or low frequency of the program material, says Chace, noting the use of a variety of processing devices. EQ and level differences between channels due to wear or misrecording of the print are also equalized.

"Because the tracks are very narrow, the signal to noise ratio is not as good as modern standards," says Chace. "There are a number of techniques that can be used to optimize the sound from these prints and, as recently as this morning, Mike and I were discussing — as two purists will — how much optimizing we should do. When is it OK it let it play just the way it was? When is it unacceptably noisy? We worked very closely with Warner Bros. to make sure that the final product maintains all the high frequencies that were there and does not create any other problems by trying to overenhance or overdo.

"We made a decision that we were not going to modernize the sound in these films," adds Arick. "The whole idea was to first make an archival transfer so that we would have an exact copy of what that print sounded like."

"For the first time in my life I've heard some favorite music (the soundtrack from *Pete Kelly's Blues*) from my record collection in stereo," says Chace. "It's such a thrill to hear it just that way and there is nothing to do to make it any better except to make sure we don't make it any worse. That's what it's about. If you had side speakers that aren't doing anything, go ahead and turn the hiss down by taking out unused channels, but don't try to modernize it."

"There are at least a dozen kinds of boxes on the market that will allow you to keep a track absolutely hiss free as long as there is nothing going on. But that isn't natural and it isn't what purists want to hear. I've become quite inspired by that attitude because of this project and, as a purist myself, would prefer to hear the lingering levels of hiss that were there in 1955, rather than trying to squeeze the

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"We take the stereo from the prints and the mono track and, using our stereo process, sew together a new four-track stereo soundtrack."

Soundtrack into some unnatural quiet place that a purist is not going to like."

Finding the right balance wasn't easy, says Chace, adding that he and Arick and the other people involved with the restoration tried a number of approaches before they were finally satisfied. "That's where Rick's company proved valuable," says Arick. "A lot of these decisions are based on aesthetics and experience and an appreciation for the charm of what we're dealing with as it is and not tinkering with it."

Chace Surround Stereo is used to matrix the four track mags to two-tracks. (Chace notes that this is not stereo synthesis but a technical matrixing of left, center, right and surround signals to provide the standards "left total" and "right total" two-track "print master stereo.") In the process, the vestigal "trigger tone" is removed. The trigger tone is used in the days before Dolby noise reduction to turn surround speakers off and on, says Chace. "If they left the channel running, the speakers at the back and sides of the theater would hiss all the time. When the amplifying equipment received the 12kHz tone it would turn on the back speakers and filter out the cycle tone. Today, if you play the print without filtering out that tone you get an extremely annoying, high frequency sound whenever the surround is going to come on."

The final 35mm mag recordings are made using Dolby SR. The new stereo tracks are then taken to PBRS where the optical tracks are shot. To date, five films have been completed by Chace Productions, including the two James Dean movies, *Pete Kelly's Blues*, *Land of the Pharoahs* and *The Silver Chalice*. Although the primary purpose of the Warner Bros. project is to restore the studio's library, the feature films will eventually be released over the next couple of years, most probably as home videos or for syndication or cable broadcast.

"Some people might think that because we used prints the films won't sound as good as they would have if they'd come off stereo masters," says Arick. "And that isn't the case. They sound incredible. It takes some time to get them to the point where they do, but they sound incredible."

For the home viewer or theater goer to experience the restored versions of the Warner Bros. films might very well be the first time the motion pictures are heard in stereo.

"A few of the films we are retrieving stereo on are peculiar in the fact that maybe four or five stereo prints were ever made of them," says Arick. "Usually they would make between 50 and 100 stereo prints, but as it got later and later into the '50s and early '60s, it was just the occasional film that had a stereo track. At the end of that period, it tended to be only an East Coast phenomenom. It continues to be a challenge to find a few films. We are still looking for titles like *Giant*, *Gypsy* and *Auntie Mame* where just so few prints were generated, and, while we might know the collector who has one, at this point, it's been hard to borrow it."

For Arick, the most personally satisfying aspect of the project has been the recovery and restoration of the two James Dean films, *East of Eden* and *Rebel Without a Cause*. "Because *East of Eden* is an incredible film and the mix was done very early in the stereo sound period, it adds so much to the experience to watching the film to hear it in stereo. To be able to restore such a vital element to both films is personally very gratifying."

The restoration of the Warner Bros. motion pictures is important not only to the theater goer or home viewer, but to anyone who cares about preserving a part of America's film history.

"Especially in the theater environment, when you have the whole frame up there on a screen, the stereo soundtrack adds an incredible amount to the experience of watching the film," says Arick. "And, if you've seen the film over and over again, to hear it for the first time in stereo is a new experience because it brings out certain things. It brings out the scoring, which is so integral to a lot of these films. To hear the different string or horn sections, to hear the way they mixed the dog over there in the corner, those little odds and ends add so much to the enjoyment of seeing the film over and over again.

"From an archivist's point of view, we need to do this because we're down to the last few prints on some of these films. If we don't do it now we'll never ever get a chance to do it again. We're just fortunate we've been able to take this chance to restore our library now before we lose the opportunity."

"When stereo TV came in I got an idea for an invention that would let us program monaural soundtracks into full, dimensional stereo." —Chace

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FOR IMMEDIATE RELEASE

COLUMBIA PICTURES ENTERTAINMENT FORMS FILM AND TAPE PRESERVATION COMMITTEE; FIRST MEETING SLATED FOR OPENING DAY OF COMPANY'S NEW FILM AND TAPE FACILITY

New York, New York, June 25, 1990 -- Columbia Pictures Entertainment (CPE) today announced the formation of a Film and Tape Preservation Committee comprised of representatives of America's leading film preservation and archive organizations in addition to executives from CPE and Sony USA.

The committee is scheduled to hold its first meeting at CPE's new state-of-the-art film and tape facility at Inwood, Long Island on Thursday, June 28. The meeting will be held in conjunction with the grand opening of the new facility, which includes one of the largest motion picture and television vaults in the world and one of the most technologically advanced global distribution systems in the industry.

- more -

711 Fifth Avenue, New York, New York 10022

CPE's Film and Tape Preservation Committee was established to work at the national level on film preservation and restoration projects and policies as well as to manage major film preservation activities directly associated with Columbia's filmed entertainment library. With approximately 3,000 current and classic motion pictures and nearly 25,000 episodes of some 270 television series, CPE has one of the most extensive libraries in the world.

CPE Co-Chairmen Peter Guber and Jon Peters said, "The formation of this group demonstrates Columbia's continued leadership in industry efforts to preserve a vital part of America's cultural heritage. We are particularly excited to have assembled a group of experts who represent the nation's leading film preservation organizations and who are familiar with the latest developments in film preservation and restoration technology.

"We are also delighted to have the participation of Sony in this landmark venture," Guber and Peters added. "Sony is recognized worldwide as a leader in advanced film and video technology and will play an important role in our commitment to safeguard our filmed entertainment heritage."

- more -

The committee is comprised of: Kenneth S. Williams, Senior Vice President, Finance and Administration, CPE; Kenneth Nees, Senior Vice President and Secretary, Sony USA, Inc.; Mary Lee Bandy, Director of the Department of Film, Museum of Modern Art; Robert Rosen, Director, UCLA Film, Television and Radio Archives; Pat Loughney, Curator of Film Programs, Library of Congress; and George Stevens, Jr., Filmmaker, Founder of the American Film Institute.

* * * *

For further information, contact:
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Mr. HUGHES. Mr. Silverstein, welcome.

STATEMENT OF ELLIOT SILVERSTEIN, CHAIRMAN OF THE PRESIDENT'S COMMITTEE, DIRECTORS GUILD OF AMERICA, LOS ANGELES, CA

Mr. SILVERSTEIN. Thank you, Mr. Chairman. Good morning and thank you for inviting me here today. I am a film director and chairman of the president's committee of the Directors Guild, which is composed of other film directors.

Because this is our first opportunity to testify before you personally and perhaps some new members of your subcommittee, I would appreciate a few minutes to place my remarks for the record in a historical context.

I represent a group of citizens who are artists, authors of films, people who tell a story, stories which reach out to entertain and occasionally uplift the American public and other audiences throughout the rest of the whole world. As you know, unlike many other film authors from other countries, those in the United States of America are afforded little protection against those who would exhibit these films in a defaced form, undisturbed apparently by the discredit which falls upon the creators.

Before the recent passage of the Visual Artists Rights Act the greatest works of American painters and sculptors could be defaced by the owners of that work if they were perverse enough to do so, but today, thanks to congressional action, that is not the case without great risk to the defacer. But today it is still the case that American film artists that make film one of our enduring cultural landmarks do not enjoy that same protection.

Film artists today work for multinational companies, and many of our Hollywood studios we are somewhat distressed to observe, are now foreign-owned and controlled, and more may be in the future. But, in any case, our writers and directors go to work for these and other companies and create magnificent films with very little or no "protection" for the art or the artist after the film is released.

The mission that brought the Directors Guild and the Writers Guild and others to Congress originally, and now continuously, is to seek redress for the sad, painful, and fundamentally unfair situation which faces American film artists. It can be summarized in a question framed in layman's language as follows: Is it right for one person to be consciously and demonstrably damaged by another person or corporation and for the victim to have no redress? I am not a lawyer, but I know that the law says that slander and libel and misrepresentation, particularly if it results in damage, is wrong for everyone, including artists, except those who work for hire. They are paid for their time and their skills, and apparently for the right to damage their reputations with impunity. There is no redress for them. They may suffer their embarrassment and professional damage in silence when one of their films is defaced and exhibited publicly or they may try to go to court where they will find they have no standing, or they may come here to Congress, the great leveler of inequities and balancer of interests.

Our mission brought us to Washington to support the moral rights clause of the Berne treaty and we were disappointed, frankly, when Congress authorized the President to sign the treaty while taking the position that laws of slander, libel and misrepresentation currently on our books are sufficient to protect American citizens. However, film artists are excluded from that umbrella of protection granted to others.

Well, as you know, Mr. Chairman, artists are never quick to rally. We are the kind of people who are separate. We are apart. We don't join groups easily. We sometimes step to the beat of a different drummer and that may, in fact, describe one of our societal roles. But not too long ago, 5 years ago, the Turner Entertainment Co., bought a whole series of films and decided, for purely economic reasons, to deface those films, to paint them over, to colorize them. American film artists were outraged. John Huston, Fred Zinnemann, Jimmy Stewart, Steven Spielberg, George Lucas, Woody Allen, Sydney Pollack, Milos Forman, and a long list of others of lesser fame but with equal dedication were outraged. So we banded together and created the president's committee of the Directors Guild and we came to Congress to seek redress, to seek an end to the practice, the American practice, Mr. Chairman, of destroying America's film heritage and damaging the reputation of America's true artistic film authors. We came and we told our story to many of your colleagues, and out of that was born the National Film Preservation Act. And I am here today to discuss what has happened to that act.

Despite the fact that the National Film Preservation Act either in its initial form or as proposed H.R. 2372 did not provide for moral rights, the act did provide important advances. Films were declared an art form by statute, and the artistic authors of film were given a limited ability to register a very general, modest, anonymous objection to changes in their work. We were very gratified at that passage. It was a step. It was a seed.

However, our enthusiasm for the proposed draft is limited because the labels have been eliminated. With respect, Mr. Chairman, if labels represent the truth and labels are eliminated then the truth may have suffered. Nonetheless, two changes would improve the proposed draft. The number of films named annually to the Registry we think might be increased to 100. And second, the term "original and complete" should be changed to reflect the phrase "material alteration." The former phrase, "original and complete," is open to semantical and legalistic interpretation. For instance, films are often previewed before paying public audiences, sometimes many times. Which is the publication in the copyright sense, the first, the second, the third, the fifth? Which is complete? Books, after all, are not sent out for previews before paying readers. They are considered published, I guess, when they go on the stands for sale. The latter phrase, "material alteration," has become a useful one as the debate on motion picture integrity has unfolded, and to us it means simply, "alteration of the material."

The bill itself refers to the protection of films including preservation and restoration. It differentiates. Well, if it mentions protection, protection from what, sir? From whom? Where is the protection to be executed? Preservation, as good a goal as it is certainly, however, is not necessarily the protection of integrity for the benefit of the artistic authors or for the public, which may not have access to the Library of Congress archives located here in Washington.

The Library's draft creates some unfortunate circumstances. Advertisements for, and cassette boxes containing, materially altered versions of films on the National Registry are free to note the special distinction of these films despite their defacement.

The French high court has added a little irony to the U.S. debate on film protection by ruling, 2 weeks ago, that John Huston's heirs may avail themselves of French law in blocking a telecast of a colorized version of their father's work "The Asphalt Jungle." Of course, U.S. filmmakers wish to enjoy such protection against defacement in the United States, and I am sure that foreign filmmakers are distressed when we can have standing in their courts but they can have none in ours. Hardly the stuff of good treaty philosophy. More will be heard of this in the future, I am sure.

However, the regard for U.S. films by those abroad may not always be as enlightened as in France. The purchase of American movie studios and their libraries by foreign interests, as I said, does give us some concern. According to American copyright law, that purchase assigns authorship of some of America's most patriotic film statements to foreign companies. What their destiny will be we cannot know. Revisions in U.S. law and the direction of rights of true artistic authors offer the best protection, in our opinion, for our country's film heritage.

We participated in the Berne debate. We recognize that the political climate is not yet ripe for the introduction of a full moral rights bill for film artists in U.S. copyright law, but we hoped that Congress would build on rather than remove the first modest step. Therefore, the excision of labeling from the National Film Preservation Act is that much more regrettable to us.

Labels, Mr. Chairman, like moral rights, will not prevent defacement of films, but they will give audiences the opportunity to distinguish between the authentic and the unauthentic, and they will give film artists the right to object to changes that denigrate their work.

I would like finally to just comment on Mr. Glickman's observation. Labels are placed on products by law, on other products, in the interest of truth in the marketplace, and we see no reason why that shouldn't apply to films. And no shot was intended at the Librarian. It was just a deeply felt criticism and an evaluation of certain aspects of the bill and a comment, which is what we assume we are all here to make. Given the Librarian's understandings and the difficulties that he faces, we think he has done as good a job as could have been done under the circumstances.

Well, in our written testimony you have read our reservations in somewhat greater detail about the present bill and our suggestions, and I would be happy to answer any questions to the best of my ability. Thank you, Mr. Chairman.

Mr. HUGHES. Thank you, Mr. Silverstein.

[The prepared statement of Mr. Silverstein follows:]

Testimony of the Directors Guild of America before the Subcommittee on Intellectual Property and Judicial Administration of the Judiciary Committee

June 12, 1991

Mr. Chairman, my name is Elliot Silverstein. I am a member of the Directors Guild of America, and chairman of its President's Committee which is charged with spearheading the Guild's efforts to advance the rights of filmmakers to protect the integrity of their work. I am pleased to testify before the Committee today on Title III of H.R. 2372, the reauthorization of the National Film Preservation Act.

The Directors Guild came to Washington four years ago to press for legislative efforts to protect the integrity of motion-pictures. The National Film Preservation Act had its genesis in those efforts. Naturally, we were supportive of the Act as it moved to passage, and we were gratified when it was enacted.

For the first time in U.S. law film was recognized as an art form. Secondly, the statute placed some emphasis on the important work of physically preserving films. Because of neglect, a substantial portion of American's film heritage has been irretrievably lost. Thirdly, and most important, films on the National Register were to have labels affixed to them giving consumers information on how these films had been altered and giving the artistic authors a chance to object to these alterations.

This last point was particularly relevant. For the first time there was to have been special recognition that those who are the true artistic authors of films are not companies, or financial structures, or owners for the purposes of copyright. Creative people make films in the same way painters create paintings and sculptors create sculptures. The difference is that film is a collaborative art form. Nonetheless, there must still be a guiding set of aesthetic principles, there must still be a central structure and controlling vision provided by the film's true creative authors. By allowing these real creative authors to object to real alterations, the National Film Preservation Act took some concern for these facts and some appreciation for the rights of the creators of film.

As you know, the present draft of the Film Preservation Act strips away the labeling provisions that were a part of the initial legislation. What is left before you, Mr. Chairman, is a bill that relates solely to the preservation of film, surely a worthy goal in and of itself.

However, the promotion of artists rights, as the rational means of protecting the integrity of film, and not solely the physical preservation of film, is what brought the Directors Guild to Washington a few years ago. Through the labeling provisions of the National Film Preservation Act, these rights were advanced in a very modest way. Consumers were to be informed that certain changes had been made in significant and important films and film artists would have had a chance to object to materially-altered versions of their work that did not reflect their own artistic visions.

Passage of the Film Preservation Act offered a brief moment when those interested in films as a creative endeavor triumphed over those whose concerns are solely commercial. But if the political victory was impressive because it was so difficult, the advancement of artists rights that victory achieved was modest indeed: the mere placement of labels on a few materially-altered films named to the national registry. First through regulation and now through this draft of the proposed reauthorization, the Library of Congress has blunted the original legislation to serve solely the purposes of preservation.

We are not enthusiastic about the present draft because it has been stripped of its labeling provisions. Clearly the Library ought not to be applying labels to films because it is so clearly uncomfortable with the concept of labeling. Nonetheless, the Library's solution to this ticklish problem raises its own set of concerns.

As proposed, films on the national registry may now have a seal of authenticity applied to them only if the versions are "original and complete." This is good as far as it goes. But films on the national registry that have been materially-altered may still be shown as is the current practice -- chopped up, compressed visually, and marred beyond recognition from the original version. Confusion in the public mind is inevitable. Badly mutilated versions of films on the national registry will have attached to themselves a sense of special distinction. Indeed, there is nothing in the bill to prevent advertisements claiming this special distinction even when the version the public is to see is damaged goods.

Whatever dignity was to have been afforded these masterwork American films is now to be severely compromised because the Library's solution will tend to confuse the authentic with the unauthentic. It is unclear why we must tiptoe around the truth.

However, these unhappy conclusions do not lead us to propose reinstatement of the labeling provisions because, as we have noted, the Library is so unalterably opposed to them. Rather, our two suggestions for this draft bill might be described as an enhancement of the preservation emphasis that the legislation now contains:

(1) The Library has expanded the range of films to be considered for inclusion on the registry. We believe the number of films to be selected to the registry should likewise be increased, from 25 to 100. The registry is not a compendium of "best" films, but of artistically, culturally, or historically significant films. Surely of the thousands and thousands of films, more than a handful are worthy of the distinction that registry placement denotes.

(2) We believe that the term employed in the Library's draft "original and complete" ought to be changed to reflect the phrase "material alteration." This is not just a semantic difference. Material alteration is the phrase that has been used throughout the debate on motion picture protection, and it is the phrase used repeatedly in the report by the Library of Congress on moral rights and motion pictures requested by this subcommittee two years ago. Also the phrase is an accurate one: Films that are defaced in some way have been materially-altered.

LABELS

As you know, Mr. Chairman, the Directors Guild feels strongly that the creative authors of motion pictures should have the right to protect their work from material alterations made without their consent. This right is accorded a film's true artistic authors in countries throughout the world. For example, several weeks ago the highest court in France overturned an appeals court ruling that had denied the rights of the heirs of John Huston to prevent the showing in that country of a colorized version of his film THE ASPHALT JUNGLE. We believe that a film's true artistic authors should enjoy the moral rights guaranteed by the Berne Treaty which our country has signed. We should enjoy the same benefit of law in the United States where the art of film originated as do the citizens of the U.S.in France whose works are altered. This is the very point of the French high court.

But at the very least, the true artistic authors of a film should be able to object to the defacement of their work and film viewers ought to know when they are seeing a film that has been changed from its theatrical form. Both of these issues could be addressed by appropriate labeling.

Of course, both of these issues were addressed by the labeling provisions of the National Film Preservation Act. The public was to be alerted to changes in the films and artistic authors were to have a chance to separate themselves from altered versions. This was the intent of the labeling provisions. Because they can serve such a useful function, the excision of the labeling provisions is enormously regrettable to those who have pressed the campaign for true authors'rights.

The Directors Guild continues to believe that the public should not be misled into believing, for example, that a colorized or lexiconned version of CASABLANCA represents the artistic intent of its creative authors. Or that David Lean's incomparable talent ever envisioned a panned-and-scanned version of the magnificent LAWRENCE OF ARABIA. Or that Frank Capra should be credited for a version of IT'S A WONDERFUL LIFE that has been "colorized" and egregiously edited to make room for more commercials.

It is ironic that the Turner Entertainment Co., among the most vocal of the adversaries to initial passage of the National Film Preservation Act and in particular its labeling provisions, should have ordered, immediately upon passage of the act, that all of its colorized films be labeled. The label that has been applied was the one included in the act and it has been applied whether a "colorized" film was on the national registry or not. This is an eminently wise and generous corporate gesture but it certainly throws into question the contention that dire business consequences must follow the application of labels.

It is also ironic that Turner Entertainment should now be clothing itself in civic virtue for rereleasing CITIZEN KANE in its original theatrical version and characterizing it as a "masterpiece" when a year ago this "masterpiece" was scheduled for defacement on the "colorization" block. Turner didn't desist in its plans until the

Directors Guild called into question the copyright owner's right to deface this storied film.

Labels will not prevent defacement of film. But they will give audiences the opportunity to distinguish between the authentic and unauthentic and they will give film artists the right to object to changes that denigrate their work.

We believe "objection labels" are a very useful concept that should receive legislative scrutiny in the near term and in a broader context than the labeling of a few films on the national register.

We also believe that these matters cannot be left to the marketplace to iron out, a claim made repeatedly by the commercial interests. The film marketplace is no different than any other, and if left to commercial byplay, all considerations will relate to a profit and loss statement. This isn't necessarily a "bad" view if it is held by those who also demonstrate a social conscience, but otherwise it simply is incredibly narrow-minded. Out of this byplay, no triumph will come to the side of those who regard American film as an enduring part of our artistic and cultural heritage. For film to be protected, for film artists to protect their work, the Congress has to take a hand.

Mr. HUGHES. Mr. Walton. Welcome.

STATEMENT OF BRIAN WALTON, EXECUTIVE DIRECTOR, WRITERS GUILD OF AMERICA, WEST, LOS ANGELES, CA

Mr. WALTON. Thank you, Mr. Chairman. I appreciate the opportunity to appear before you and the other members of the committee.

As you noted, we have submitted a written statement on behalf of the Writers Guild to you, and I am going to attempt to take seriously your admonition not to repeat it and try and get to the meat of this.

Our statement had, really, two essential elements with regards to H.R. 2372. The Writers Guild strongly supports the film preservation component of the bill, appreciate the work of the Board and the Librarian. We note with some pride that Mrs. Kanin is one of our more treasured assets at the Writers Guild, as well as a number of other institutions. And our president, George Kirgo, has served on that Board, and we appreciate their work. We believe that preserving film for all of the reasons enumerated here today is crucial, so we support that.

However, with regards to H.R. 2372 we have to state our regret that it excludes, we believe, consumer protection and it excludes protection for film artists with regards to the films that will go onto the Registry. Our statement more fully addresses that, but our concerns, and you alluded to them, sir, in one of your questions to the Librarian, is that it will be possible, as we understand it, for someone in advertising a video version of a film, be it a video version that is shown on television, or on a cassette for rental or sale in a store, to either allude to the fact that this thing has the seal or that it is on the Registry, thus leading someone to believe that they are going to watch a national treasure in its original form, but the fact of the matter is there is no preclusion from that advertising reference being totally false and misleading so that what they get is a chopped up version. That troubles us. And our experience with those lower down on the food chain in the distribution business is that, in fact, that may be likely to happen. There is a lot of need to advertise film and to get money for it, and it is not unknown that people will put out a statement which perhaps isn't 100 percent accurate. Essentially, we think that establishing the seal is probably a good thing. As we understand it, it cannot itself go on video or on a laserdisc. That is our reading of the act and I think the congressional intent should be clear in that regard.

But the problem with somebody making a reference to the seal is the one I have just alluded to, and we think that is a problem. So it is a step back, I think, in consumer protection. And for the same reason, it is a step back for artistic protection, and I have enumerated that in the statement. Someone can look at a video version, be it on television or in the packet, and believe that they are watching the artists' original work, and in fact they are not.

We hear that labeling is so terrible. But here we have a situation where if this act passes, the Congress will have created a label of a sort, a seal. It will be there. Somebody can make reference to it. They can mislead. But we can't, we are told, have another label that corrects that situation. That doesn't seem particularly appropriate to us.

We also believe that the Librarian will have to struggle with this language about the original unaltered version. Clearly there will be some circumstances in which it will not be easy to point to what that is, but we do believe that it would be important that as the Librarian goes about his work, should this bill pass, that the congressional intent be very clear that what Congress intended was that, as far as is possible, he use the most narrow definition, the closest that one can come to that first public theatrical release.

Those are our comments on the bill. In summary then, we support the preservation aspects.

I did seek in my statement, and at some length as is my wont, to try and put this bill into context, and I hope I don't take too much license if I take 1 second to do that here, Mr. Chairman. Mr. Silverstein has alluded to some of that context, Mr. Counter, in some of the other questions, and in your opening remarks you indicated there may be more on the moral rights question in the Congress. But one of the things I have learned in my job as I have had to travel to several countries to meet with artists groups around the world with whom we have similar interests is that the lack of moral rights in the United States, the fact that the United States is perceived, to use the words of the late Sir David Lean, as a "slaughterhouse of film," is poisoning the debate on quotas and on cultural integrity in Europe and elsewhere, and I have gone into that in my statement. I raise it because so often I hear people coming to the Congress, and read of people coming to you, saying, Well, you know these artists, I mean they are just out there and they don't understand commerce, and all these labeling things they want are just annoyances. I think it goes to the very heart of our civilization. It is a personal view. It is also the view of my institution.

But, as I have traveled around the world, I have noticed that this perception of the United States as a country without respect for its primary art form is indeed poisoning the situation abroad when these quotas are being debated, and I have stated in my statement, the written one, that it is a somewhat illogical point of view. Perhaps it is inchoate, it is indirect, but it is there. A couple of examples.

I was having lunch in Paris a couple of years ago with my counterpart, secretary general of the SACD, the Societe des Auteurs et Compositeurs Dramatiques—I will give you my French pronunciation—and with him was the president of the organization, M. Claude Brulet, and they apologized to me that they would have to leave early. They said, "We are going to a meeting and we have to leave." And I said, "Oh. Where are you going?" And they said, "Well, we have a meeting in the office of the president." And I turned to the president of the society, and I said, "In your office?" And they said, "No. The Office of the President of the Republic." I was impressed. I don't usually leave lunch to go to the White House. Maybe because I live in L.A. But I was curious. Well, what business takes you to talk to the President of the Republic? And it was a quota bill and their concerns about the flood of product from outside of France into their country.

Now, whether President Mitterand was there for the whole meeting or not, I would doubt. But I was struck with the access that was there. And I have noticed that as I have traveled. I have noticed it in lots of countries.

And this thing, this moral rights, that is seen, apparently, to be such an interference with commerce here is deeply felt—deeply felt by us, but deeply felt around the world, and I wanted to introduce the topic. Because if we are going to revisit this, and I hope that we are, as a country, I think it is appropriate that we understand that our way of doing business terrifies artists around the world. The lack of respect for art and artists in the United States, the perceived lack of respect and the actual lack of respect, which may be different but nevertheless are both there and both real, I think is hurting us.

And I have made that point in my written statement, and I wanted to draw your attention to it orally and say that when we look at what happened in 1988 we saw two contradictory signals. The Berne Treaty Implementation Act without moral rights for film authors was seen by our friends and colleagues around the United States as a very negative message vis-a-vis our civilization and how we felt about film art.

The enactment of the 1988 Film Preservation Act, however, was seen as a positive step. A small one and an imperfect one, but from our point of view a glimmer of hope that we would, in fact, continue to proceed in a good direction. That bill had three principal components: Preservation, a very good and worthy goal; consumer protection; and artist protection, as to the films that were to be selected. The bill today has film preservation, no consumer protection and opportunities, I believe, to mislead consumers, and it has no artist protection. And we may revisit those.

We are not here to argue for a major reforming of this bill. We are to some extent realists, although we may also be dreamers from time to time.

But that bill, the one before you today, Mr. Chairman, is going to send a signal about where the Congress is and where the country is, and I continue to believe that that is going to poison our abilities to deal with some of these other important economic issues which in turn are going to redound to the detriment of our balance of payments, our employment, the ability of our own artists to express themselves.

I hope that larger context is helpful to you and to the committee as you proceed with the work here today and with the other things. And I thank you very much for your time.

Mr. HUGHES. Thank you.

[The prepared statement of Mr. Walton follows:]

STATEMENT OF BRIAN WALTON IN REGARD TO H.R. 2372 ON BEHALF OF THE WRITERS GUILD OF AMERICA, WEST TO THE SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION, HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY, JUNE 12, 1991

Mr. Chairman:

I am Brian Walton. I testify on behalf of the Writers Guild of America, west, in qualified support of H.R. 2372. We appreciate the invitation to the Guild to have a representative here. I regard it as a personal privilege to take part in these important deliberations. I thank the Chair and the members of the Subcommittee for this opportunity.

I have been a member of the California Bar since 1974. Prior to assuming my current position I occasionally represented the Writers Guild and individual writers. For almost the last six years I've been Executive Director of the Writers Guild of America, west (WGA or Guild), a union representing the collective bargaining, professional and artistic interests of approximately 7,000 writers of motion pictures, television and radio programs in the United States. Our members reside primarily in California and other western states, but also in many other states of the union and in several foreign countries.

As Executive Director of the Writers Guild, I act under the direction of the Board of Directors, as the Guild's chief negotiator and chief administrator. I correlate the work of its many committees, supervise its staff of approximately 90 people, and I am the Guild's principal contact on a regular basis with film and television production companies, and writers' and artists' organizations throughout the United States and around the world. My current role requires me to keep abreast of the film and television industry domestically and around the world both in terms of its economic and technological trends and in other regards, including matters related to the rights of artists and the treatment accorded art generally.

Mr. Chairman, I would like to do two things in my statement today. First, speak specifically and directly to H.R. 2372 and second, put this legislation into a larger context which I find largely ignored in recent debates in the Congress on the rights of film authors.

I. H.R. 2372

THE WGA OFFERS QUALIFIED SUPPORT FOR H.R. 2372

Film Preservation

The Writers Guild of America supports H.R. 2372 on a qualified basis. We support the findings of the Congress as contained in Title III, Section 302 indicating that film is an enduring part of the national cultural heritage of the United States and we applaud the goals of the registry of films, and the other preservation goals. We strongly support the film preservation component.

Consumer Protection

The Act must be recognized, however, as a step backwards in the area of consumer protection. If one reads Section 312(3) together with Section 304(a)(2)(C) to mean that the seal may be used on a film copy -- not a video or laser disk copy -- then it would seem entirely possible that the film to which the seal has attached will rarely be seen in its original form. A television distributor or programmer, or a video distributor, however, without using the seal, but by referring to it, or to the fact of the film's inclusion in the National Registry, could mislead the public into believing that the video version which they are providing is a national treasure. The fact may be that the video version has been materially altered in any number of ways and thus the public will watch such an altered version without any warning that they have been misled. Thus, in this regard this bill, rather than advancing the cause of cinema art, allows the cynical to advance the opposite.

Artists' Rights

Exactly the same scenario would mean that the reputation of the principal authors -- the screenwriter and the director -- are damaged. Believing that the version they are watching is a classic, the public could well view a materially altered film and believe that it is the original film, but it could be far from the work of the writer and director and the public none the wiser. Thus the public would be damaged --conned -- and the reputation of the screenwriter and the director harmed.

Both of these problems could be corrected by a simple requirement that whenever in advertising or promotion of a video version -- on television or cassette -- reference is made to the seal and/or the inclusion of the film in the Registry when the video version is altered, notice be given that the version to be viewed has been materially altered so that the film is not being presented in its original form.

Congressional Intent

Finally, the Congress, should, I believe, make it crystal clear that the legislative intent in using the words "original and complete versions as they were first published" in section 304(a)(2)(C) and in directing the Librarian to establish criteria and guidelines under section 304(a)(1)(B), is to have the Librarian act with the most narrow of definitions to apply the seal to that publication which was the first theatrical release to the general public.

II. H.R. 2372 AND THE BROADER CONTEXT: THE INTERNATIONAL FUTURE OF AMERCICAN FILM

The work of any deliberative body must obviously focus on the work at hand and the work at hand today is H.R. 2372. I believe, however, that I am not expanding my license here today, if I put these deliberations in an important broader context.

Some facts we all know are these: Film as it has developed in this century has been often identified as an indigenous American art form. It is recognized as such in H.R. 2372. Filmed and taped entertainment is second only to aerospace as a positive export market for the United States. The Writers Guild has no complaints about that situation and we'd be delighted to see it increase. We also know, however, that there are debates raging about the future of American film and television abroad. They concern us. They trouble us. They are serious. They should concern this committee. What happens with moral rights for film authors will impact those debates. H.R. 2372 will become part of those debates.

Moves are afoot which would have the effect of imposing or maintaining quotas which would restrict the importation of American film and television product. These debates are ongoing in the General Agreement on Tariff and Trades (the Uruguay Round), the councils of the European Economic Community, within government circles in the member states of the European Economic Community, in Canada, Australia and elsewhere.

Those quotas will threaten American employment, American exports and therefore threaten return on investment outside the United States. Revenues from foreign exhibition are increasingly important to profitability. As Mr. Valenti and his colleagues argue for free trade so that American product can continue to be imported unrestricted in countries across the world, it is very important that the Congress understand how the United States is perceived in regards to art and culture, especially film, an indigenous American art form.

That perception is hurting us.

The WGA is a member of the International Affiliation of Writers Guilds, guilds of writers of film and television in primarily English-speaking countries.*

In addition, we have relationships with other writers' organizations around the world. My duties have required me to travel to Argentina, Australia, Austria, Canada, France, the Federal Republic of Germany, New Zealand, Switzerland, and the United Kingdom to meet with writers' organizations and writers representatives, and those of other film artists, from most countries in the world. This interaction has afforded me the opportunity to learn, first hand, that the interests of American writers and other American film artists are in many ways similar to the interests of film artists around the world. Those experiences have also convinced me that the lack of moral rights for film authors will be used as a sword to hurt us economically. I believe the Committee should have this connection in mind as it deliberates on this bill and others which may come before it in the future with regards to film as art and the rights of film authors.

The connection between the moral rights issue and the free trade issue is at first blush perhaps a little hard to grasp. It is vague, inchoate, indirect and not altogether logical. But the connection is real; its consequences will be real. Actions are taken within given environments, and the free trade environment is being poisoned by the picture of the United States as a home for artistic barbarism in regard to film.

Carved into the walls of our National Cultural Center are these words of President John Kennedy: "I look forward to an America which will not be afraid of grace and beauty. I look forward to an America which commands respect throughout the world not only for its strength, but for its civilization as well. -- We, too, will be remembered not for our victories or defeats in battle or in politics, but for our contribution to the human spirit."

When our fellow artists around the world look at the United States, they see President Kennedy's vision blurred in regards to film art and film artists. When American film artists look at the United States, they see that same blur.

The American film industry is often viewed in negative terms by film artists' groups around the world. And these groups are respected and have influence within their countries. They are listened to. Of course there is great admiration for much of the film art produced here, but the United States is seen as a slaughter-house of film, as a country without laws to protect the artistic rights of film authors, as a country which wants copyright protection only for economic reasons, but which does not even pay lip service to the moral rights provisions of the Berne Convention, as a country which prizes film as a commodity and not as art. That these perceptions may not be entirely correct across the board, does not mean that those perceptions will not work to our detriment as all of these debates unfold.

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* The Writers Guild of Canada; The Australian Writers Guild; New Zealand Writers' Guild; Societe des Auteurs Recherchistes, Documentalistes et Compositeurs (SARDEC, Quebec); the Writers Guild of Great Britain; and the Writers Guild of America, East.

Writers and directors groups around the world are terrified that American film industry business practices will be imported into their countries. They fear they will be stripped of the moral and artistic rights which they now have. Regardless of whether that fear is accurate, there is no question that political and business interests in foreign countries whose true agendas are only marginally cultural, will continue to listen to and use artists' groups around the world to create a political milieu in which to argue against American interests.

As many of these countries move to impose or maintain quotas or other restrictions on American product, those in favor of them will argue that such restrictions are necessary for their cultural integrity. We must understand and appreciate the current inability of many film industries easily to compete with ours and we must acknowledge and deal with the economic and cultural aspects of that reality. As one travels around the world one is often struck by the dominance of American product on foreign television and movie screens. As people in these foreign countries debate the quota situation, they argue that it is not an economic concern, but it is a cultural concern. Their arguments are not unlike those which we heard, for example, in the 1960's when Americans of African or Hispanic heritage would complain that the theatrical motion picture and television shows which they and their children watched did not reflect their reality. I was in New Zealand recently and learned that somewhere around 2% of television time in New Zealand is filled with New Zealand product. While that percentage is larger in various countries, the dominance of screens by foreign product, largely caused by the enormous and prolific output of the American industry, is prodigious.

The debates in these countries, will focus on: 1) Cultural integrity (the need for the citizens of a certain country to create and see shows about their own culture); 2) Quotas (intended to keep out foreign product usually expressed as a percentage of screen time on television or in distribution); and 3) Government subsidies for film and television works.

All of these arguments -- quotas, cultural content and the subsidy arguments -- are played out in the given country's or continent's social-political arena, and the strengths of various points of view ebb and flow with the times. Perception and attitude are very important. How the United States is perceived in regard to film art will be an important factor. And believe me, we are not perceived particularly well.

It is my belief that political and business interests in other countries will therefore use this cultural argument, pointing to the lack of respect for artists and art in the United States in an inchoate, but effective way to create a climate, a milieu, in which to argue for restrictive trade practices which will end up hurting the industry and ultimately American artists and their ability to express themselves. It may be easy for some American business interests to find ways to circumvent these economic barriers by, perhaps, setting up foreign subsidiaries and engaging in joint ventures and the like. The economic imperatives and drives of multinational conglomerates will see that they do. Those who will be short-changed in the process are American artists who find themselves excluded from practicing their art and their craft, the American consumer who will be deprived of viewing it, and our balance of payments which will see money which should be coming here going into the multinational corporations' subdivision in other countries.

If we are to do well in the ongoing tough debates on trade, we must understand that the artistic and cultural component of the debate must be addressed. H.R. 2372 is part of this bigger picture.

THE BERNE CONVENTION, THE 1988 FILM PRESERVATION ACT AND H.R. 2372

The Writers Guild of America is strongly in support of full moral rights, as prescribed in the Berne Convention, for a film's principal authors, the screenwriter and director.

In 1988 there were two actions of the United States Congress which sent contradictory messages to film artists' groups in this country and around the world. The passage of the Berne Treaty Implementation Act without moral rights for film authors was a negative message. The passage of the National Film Preservation Act of 1988, while certainly not a perfect piece of legislation, and from our point of view, clearly not going far enough, was a very positive message. It enabled the Writers Guild and the Directors Guild to share with our friends around the world the hope that America would live up to the spirit of the Berne Convention and to that hope enunciated with typical eloquence by President Kennedy. The 1988 Act gave hope that we would go further in recognizing that those who are the primary authors of this indigenous American art form would have the respect in their own country that they can have elsewhere. In this regard, the National Film Preservation Act of 1991 -- H.R. 2372 -- is a step backward, not a step forward.

The National Film Preservation Act of 1988 had three principal components. They were:

1) Film preservation.

2) Consumer protection.

3) Limited protection for artists' rights.

The Film Preservation Act of 1991, H.R. 2372, deletes consumer protection provisions and deletes any protection for the rights of artists.

In the overall scheme of things, in this context which I have sought to paint for you today, please be aware that H.R. 2372 is going to be perceived as a step backwards. The signal that H.R. 2372 sends, positive though it is with regards to film preservation, will be notable by its silence on the question of moral rights and on consumer protection.

America's film and television writers -- the authors of America's stories which are seen around the world -- labor at the very busy intersection where art meets commerce. The search for the balance of the needs of art and the rights of artists, on the one hand, with the needs of commerce and the rights of those who own the exploitation rights on the other, is necessary. The conflict thus generated is neither new nor unresolvable. But we have to find that balance in the United States. We have not done so yet.

I hope that as that search continues, in the deliberation on H.R. 2372 and on subsequent items that will come before the Congress, these weighty matters will be seen in the broader context which I have sought to place before you. We need to do much better in the moral rights areas, not only to prevent President Kennedy's words from mocking us, not only because our national honor is at stake, not only because we need to lift the level of our civilization, but because our actions and inactions will have consequences in many areas, including to our economic well being.

Thank you, Mr. Chairman and members of the Committee.

Mr. HUGHES. I had no doubt when we structured the hearing that we would get into a major discourse over moral rights. I never dreamed that it would be any different. It is an important issue and we are going to schedule some hearings and give, in fact, a lot of attention hopefully to the moral rights issue.

Mr. WALTON. I am glad to hear that, sir.

Mr. HUGHES. I am aware—I read your statement last evening—of your tremendous concerns, particularly in the international community and where we negotiate the GATT initiatives, just where we come out on that and many other issues that I know are important to you.

Mr. Counter, we undoubtedly have a long way to go in preserving films made before 1951 and even preserving films made more recently. Has film technology improved so that films made today will not require special preservation or restoration efforts? What is the situation?

Mr. COUNTER. Well, the technology has certainly improved, and I am certainly not an expert in this area but I am told by the people who work in this area within our companies that the technologies today do allow you to do this, but they are still concerned about preserving films as they go, if you will. And so our companies are embarked on, really, a dual track here in going back and restoring and preserving films that are already in the libraries and then preserving films as we go.

The problem, as I understand it, in the area of the materials that are used to make the color on the film stock, is that you still have chemicals there that can deteriorate over time and therefore preservation is a constant process. So we will continue to work in both areas.

Mr. HUGHES. How much money in the past year has the industry spent on preservation? Do you have any idea?

Mr. COUNTER. I don't have a total figure. The companies don't share this information among themselves for some obvious reasons, but I know it is in the tens of millions of dollars, just by the few companies that I know about personally.

Mr. HUGHES. Well, if you would like to submit some more exact figures, the record will remain open for you to do that.

Mr. COUNTER. We will be happy to do that.

[The material was not supplied.]

Mr. HUGHES. That would be very helpful to us.

Mr. Silverstein, what have the Directors Guild and Writers Guild, West, done to preserve films?

Mr. SILVERSTEIN. I am sorry, sir, I didn't understand the question.

Mr. HUGHES. What has the Directors Guild and Writers Guild, West, done to preserve films?

Mr. SILVERSTEIN. Mr. Chairman, it is important to realize that we don't have access to the copyright owner's property as such, but I want you to know that across the collective bargaining table as long ago as 12 years we protested the defacement of films. As a matter of fact, one of our most prominent members flew from New York to Los Angeles to observe—that was Milos Forman, observed that the film "Hair" had been exhibited with nine, sir, nine of its musical numbers cut out, and we pleaded with the CEO's of the companies to put a stop to this. They observed that Milos Forman being who he was, if he had only called MGM and protested, they might not have done that.

Now, what they were saying was that if you are big enough you might get protection from this kind of embarrassment. What we say is that this kind of protection is a human right. Not simply a right for giants, but also a right for the small man and woman. So we brought this across the collective bargaining table in an attempt to deal with that aspect of it.

In other areas, for instance, Steven Spielberg has been very active because he is prominent enough and has the public muscle and private muscle to effect changes or encouragement to change. I think "Lawrence of Arabia," the update of that had something to do with his efforts.

I don't think anybody is resisting the restoration of films, sir. I think we are not in a position to say to the companies you must do this or must do that, unless we were benefits of a doctrine such as moral rights.

Mr. HUGHES. I imagine the film materials that you and other directors have, including, for example, shooting and continuity scripts as well as original copies of your films would be enormously valuable to the Library of Congress. Do you, yourself, have original copies of your films?

Mr. SILVERSTEIN. I do in two cases, and that was because the companies both were happy with the results and gave me copies for my own library. Other directors do. Most do not.

Mr. HUGHES. Two out of how many? How many films have you directed?

Mr. SILVERSTEIN. Feature films, I think I have five.

Mr. HUGHES. Two out of five. Would you make your personal copies and other materials available to the Library to be included in the National Registry collection?

Mr. SILVERSTEIN. I am touched by the suggestion that they would honor me so by wanting them. Of course.

Mr. HUGHES. So, from that vantage point, obviously, you think that the initiative has some merit?

Mr. SILVERSTEIN. Oh, absolutely, sir. Absolutely.

Mr. HUGHES. Your quarrel is that we have not really addressed some of the other concerns dealing with moral rights.

Mr. SILVERSTEIN. It is not only that, Mr. Chairman, it is the fact that, if I understand the testimony here this morning and the bill, the benefits offered to the films nominated will be to archivists, scholars, librarians, but not to the general public. I mean we sit here in Washington where the Library of Congress sits. We were concerned with the public across the country, some of whom will never have the opportunity or be able to visit Washington. They will see these films mostly on television in a defaced form, one of the half a dozen defacements. If they see them for the first time, that image will be impressed on their consciousness for all time. That is the film.

I must tell you I, myself, saw one of my own films on a station in Los Angeles, and I looked at it and I was sick. I, myself, could not follow the plot. It had been cut to ribbons. Now, my name was up there as the director. I knew what Milos Forman was talking about. What protection did I have? None, sir.

Mr. HUGHES. I did not get to questions dealing with what services would be provided by the Library of Congress for the general public, but I know for a fact that the Library does from time to time have special programs for the general public, and I would be very surprised if they did not make these films available from time to time for the general public to view. I would be very surprised.

Mr. SILVERSTEIN. Well, it was our hope, frankly, and perhaps with the nomination of the National Association of Theater Owners something like this might happen. That the films that are so nominated might be once again placed in some kind of special program for the benefit of the public, hopefully with the seal, hopefully undefaced, hopefully in the form in which they were first released.

Mr. HUGHES. I understand. Mr. Walton, the Directors Guild proposes that the number of films selected each year for inclusion be increased to 100. What is your view?

Mr. WALTON. I think that, if I understand the thrust of the bill today as it deals with preservation, as I say, we support that. We think that goal is terrific. As I tried to grasp the bill as it is in its current form as to what it really is supposed to do, I see it, in essence, as setting up the Library of Congress and the National Film Preservation Board as something like—I don't know if a quarterback is the right analogy, but some kind of a leader of a national effort both by moral suasion and a little money and a few programs of highlighting this, highlighting that, basically to get the private interests as well as the Library itself to really get behind a national preservation program.

I was interested in Mr. Coble's question earlier about was the Federal Government going to do all of it. Certainly not under this act. I think what the Federal Government is doing is saying to the Librarian, "Go out there and by using these programs move preservation along." To that extent, I would support expanding the number. Quite frankly, personally now, I don't know that my Guild has taken a position on the number. We don't see the number as crucial. I think that if it stayed at 25 it is not going to be the end of the world. But if it went to 100 it is still going to be a drop in the bucket. We are dealing with scores of thousands of films here, and your testimony earlier today and your opening statement alludes to thousands of films that are out there. So, if we bumped it to 100, you know, it would be just another affirmation of the importance of preservation. I don't think it is an objectionable number.

Mr. HUGHES. I see. Thank you.

Mr. SILVERSTEIN. Mr. Chairman, may I make one other observation, please, sir?

Mr. HUGHES. Mr. Silverstein.

Mr. SILVERSTEIN. This bill, as conscientiously as it has been drawn, may be on the fine edge of obsolescence even as you pass it. Because with the advance of technologies which will affect the country substantially in other areas with which you deal, the definition of "affixed to film stock" as being something that requires the credentials for qualification here may, within a number of years, be obsolete because there are new techniques of recording. For instance, digital recording may in the future be the medium of choice and film stock may not any longer be the choice by either companies or filmmakers. So that the limitation there may be placing this bill in a certain danger because it relates to the recording medium, and that is one of the important differences between that and the human right of moral rights that protects the artist regardless of the medium. That will not become obsolete.

Mr. HUGHES. Your point is well taken. In the short time I have been privileged to chair this subcommittee, I have found it remarkable that our intellectual property laws have managed to keep pace with evolving technology, and we are going to be called upon every year to review basically our intellectual property laws in the international context to see whether or not they do protect our scientists and our creators of intellectual property of all kinds and are relevant to the global competition in which we find ourselves involved.

Your point is well taken but the answer is we are going to have to continually go back and look at our laws and see whether or not the framework within which we protect intellectual property is still relevant. So, I agree.

The gentleman from California.

Mr. MOORHEAD. Thank you, Mr. Chairman. Mr. Counter, as your testimony indicates, there is substantial private sector effort to preserve films. There seems to be a strong distinction that has been made here today between restoration and preservation. Dr. Billington testified that there is very little private money being spent on preservation. Is that the findings that you have? That films are being restored but preserving the original films is really not getting much attention?

Mr. COUNTER. Well, certainly within the major studios it is getting attention, the preservation side as well as the restoration side, because in order to be sure that you are in a position to not go to great lengths in terms of restoration you have got to preserve as you go. So that our companies are spending a considerable amount of money in the preservation area as well as restoration. As I have indicated to the chairman, we will get you some specific dollar figures on that. But efforts are going on in both areas.

Mr. MOORHEAD. Well, if the companies are now spending a great deal of attention to their own films, could the Film Board's preservation effort be limited to the films that are in the public domain?

Mr. COUNTER. Well, that certainly, we think, should be the focus because that is where the greatest need is, and since this is such an enormous project for the Library of Congress we think that certainly should be the focus.

Mr. MOORHEAD. Do you have any suggestions for them other than that, other than what you have already made?

Mr. COUNTER. Our problem is we don't have access necessarily to all of the people that have the private collections, and I think a part of this effort will be to catalog exactly, as best we can, where the films reside and who the owners are today.

Mr. MOORHEAD. Is the use of these films for the future, the availability of them far too restricted as far as any public enjoyment down through the years, remember how things were or just restricting it to scholars? It really deprives most people of any access whatsoever. Do you think that is a mistake or could it be done otherwise?

Mr. COUNTER. Well, our view is that we would hope that any legislation coming from the Congress does not in any way place barriers upon the dissemination of these motion pictures throughout the United States and the world, for that matter. But going to your point, your constituents in your own district who may not be able to go to movie theaters and their only access to movies is through television or on videocassettes. We are very concerned that dissemination of the work in those formats not be in any way impacted by legislation from this Congress.

On the preservation side, however, we think it is quite appropriate for the Library of Congress to be the repository of archival quality prints so that for historical purposes they can be preserved, and in that narrow focus we support it wholeheartedly.

Mr. MOORHEAD. Mr. Silverstein, in your testimony, on page 5, you indicate that the words "material alteration" should be put back into the bill because they have an accepted meaning and have been used repeatedly in the debate. It is my understanding that these words created much of the debate. You will recall that this subcommittee had nothing to do with drafting that particular language that was contained in the present law.

Wouldn't that be better handled in a separate piece of legislation before the subcommittee?

Mr. SILVERSTEIN. Perhaps. I merely put it forward as a better term and one that actually has been passed back and forth in various discussions about the bill—material alteration. If I could point out to you, sir, as I said in my testimony, the word "original" can be debated. I mean it is a lawyer's delight as to which is the original. And it may even be a practical delight to argue that. "Complete" might very well be argued by the owner of a copyright that it is not complete until he or she says it is complete. An example being a Alfred Hitchcock film which was exhibited and distributed for many years and then, lo and behold, into that film—"Rear Window" I think it was—a dream sequence which Mr. Hitchcock had discarded was placed back in in order to provide an expanded version for exhibition. Now, lawyers for the company could very well argue, "Well, we never said it was complete. It's now complete."

I have been personally present at arbitrations on language in the Directors Guild contracts in which the words "final cut," which means "the final edition," was argued by the opposition, in fact, not to mean, "final." George Stevens had a case before the courts in which he presented his contract in which he had "final cut." It was argued not to be final cut.

So I am a bit concerned about these words which are open to ambiguous interpretation being used as a foundation for, perhaps, future legislation.

Mr. MOORHEAD. Some of the films go out for previews and they kind of bomb a little bit, they go back and get changed around a little bit—material alteration.

Mr. SILVERSTEIN. Yes, sir. And that is the purpose of the previews. That is why when we, in our previous testimony before this committee, said that we thought that the version of the film which should trigger, in effect, moral rights should be that one after previews, trial runs and festivals, so that the company, the investors, the artists, have all that time to have that volcanic exchange of opinions which ultimately gives birth to something, and when that "something" comes out into the marketplace after everybody compromised and argued, that is it.

Mr. MOORHEAD. Well, you know we can argue about words and about how things should be done, but I think we all agree that motion pictures are one of the greatest sources of entertainment we have ever had in this world. I know that—I think everybody here really has their lives enriched by them, and I know I have had mine enriched by the work each one of you have done.

Thank you.

Mr. HUGHES. Can I add "Amen" to that? I couldn't agree with you more.

I listened attentively to your suggestion that material alteration might be a better term, but basically that is very ambiguous too. I mean major alteration of what? Of, you know, what stage? Unless you define major alteration, I suppose you would afford lawyers another full employment service in trying to define that.

I think no matter what we use, without some guidelines perhaps on what criteria is to be utilized, we are going to have some problems attempting to reach some agreeable definition.

Mr. SILVERSTEIN. Sir, no matter which side of the coin you look at there would be a better situation than we face now. As an example, if you were to accept, in the future, "material alteration" of the film after trial runs, previews and festivals; that is, after what I just described a moment ago; and, if you decided that you want material to be a noun, it is alteration of the material that would trigger whatever Congress says it should trigger, whether it is moral rights or a label or something of that nature. That is fine. That is what we prefer.

If you use it as an adjective, then it requires a level of proof. Is it material or not? I mean, again I am not a lawyer but I assume that is what the meaning would be. But there is some chance to have a dialog. Original and complete is so broad. Those words are so broad that, I mean, I can hear the arguments now as to which is original and whether it is complete.

Mr. HUGHES. I understand. Mr. Walton, writers of screenplays and other materials could provide a wealth of information to the Librarian in preserving and restoring films and to users of the National Film Registry collection. Would the Writers Guild cooperate with the Library of Congress to obtain those materials from the members of the Guild?

Mr. WALTON. Oh, absolutely. We could do so, if your question suggests that, for example, by the provision of scripts and so on that they can help track down what was what. We would be more than happy to do that.

Mr. HUGHES. That would be very helpful.

Mr. WALTON. Yes. We are very fortunate at the guild in Los Angeles. We have a library which contains—I want to be careful here, but I believe it contains virtually every script of an Academy Award-winning or Writers Guild-award winning or Emmy Award-winning film or television program, and there are others. And we would be more than delighted to participate in that.

Mr. HUGHES. Well, that is superb. I am sure that would be a big help.

A number of individuals and organizations have expressed concern about the Government's role in selecting films for inclusion in the Registry. You heard some concerns today. The Committee for America's Copyright Community suggested, for example, that the Librarian and the Board should not make qualitative decisions about the relative merits of various motion pictures.

In your view, are these decisionmaking activities of the Librarian and the Board inappropriate? Any member of the panel.

Mr. WALTON. Let me address that. I am, for whatever it is worth, a card-carrying member of the American Civil Liberties Union from time to time, and I don't agree with everything they do but I see they sent in some statements on that and it caused me to think. I do believe that it is appropriate, in the guise of preservation and as a vanguard of pushing that effort for the Librarian in the context of this act with the assistance of the Board, to designate things to go onto a registry. As long as that role is limited as it is in the act, I don't think it should give constitutional offense, and I don't think it ought to give policy offense.

I do understand the concerns of the people that raise that, however. It is problematic whenever we have the Government getting into artistic judgments which tend to have a chilling effect on speech. But inasmuch as these are, by the very nature of the act, restricted to things that have already happened, and I don't believe there is any implication in the act that there is an artistic inprimatur indicating one form of expression or one point of view is better than another, I don't find it objectionable.

But I would say I do have some sympathy with those who do have concerns.

Mr. HUGHES. Well, the ACLU, in fact, wrote to me, and they believe it is unconstitutional to require a private party to place a label with specific government-mandated wording on a product like motion pictures. They believe that because motion pictures are protected by the first amendment, at least, that would be unconstitutional absent a showing of some compelling government interest.

Mr. WALTON. Well, I think that, as I understand, and it has been a while since I have taken constitutional law classes, but when I was doing that and studying it with more detail than I am now, it was my understanding that one looks at both the degree of the Government action and the interest that is being protected. I don't see that if you are dealing with something that is already there, that has already been expressed and it is not a prospective looking matter—I would like to read more of their brief—I don't see that as a problem.

I think that what is going on here is that the Congress will have authorized the Librarian to use the fact of the Registry to advertise the importance of preservation, and the Government interest here is not ideological. It is, in fact, cultural to the extent that what you are saying is we are going to promote an indigenous American art form and its preservation, and we are going to use the Registry as a means of drawing attention to that and you are not excluding anyone else from putting those films out.

So I think this falls short of being offensive. But I think it is an area in which you ask appropriate questions. I don't believe it is unconstitutional.

Mr. **Hughes**. Thank you.

Mr. **Counter**. Could I comment on that, Mr. Chairman?

Mr. **Hughes**. Yes, Mr. Counter. Sure.

Mr. **Counter**. As I understand the letter from the ACLU, they saw the constitutional problems with the present act, in the labeling requirements under the present act, and they raised a very excellent point in that regard. But they conclude, I think, that the act that you are considering for this legislation, by merely providing a seal in this limited context, creates the same constitutional problems as in the 1988 act.

Mr. **Hughes**. Yes, I read it the same way.

Mr. **Walton**. OK. Well, then may I quickly address that, if I misapprehended your question?

Mr. **Hughes**. Sure.

Mr. **Walton**. Because if the ACLU's objections are that you cannot have labeling such as was in the 1988 act, then it seems to me that you then have to balance that act against another interest. And it seems to me that the United States is a charter member of the United Nations. The Universal Declaration of Human Rights talks to the rights of artists much the same way as does the Berne Convention. What does it mean when it says in article 6 bis of the Berne Convention that after the artist, "the author"—it can't mean a copyright holder in the way Mr. Counter talks of his client companies or his member companies—what does it mean when it says that the author shall maintain the rights to his or her reputation after they have transferred the economic right? It has to have a meaning.

And, that meaning is deeply embedded in Western civilization, or at least some parts of it. And our adherence to the Universal Declaration of Human Rights and the Berne treaty and other things would tend to suggest that that concern for an individual author's rights has got to be given an equal weight as any first amendment right, particularly when the first amendment right is here being used by those who, in essence, would act for commercial reasons against the artists rights which are important to our civilization. As you say, we are going to revisit that.

I am a firm advocate of free speech. My organization just authorized me to send a letter to the Chinese ambassador the other day about some of the stuff going on with films in China because we don't like what they are doing there. We get about as rabid as anybody can get about free speech and government interference with it. But for artists and for the copyright holders only to the extent that it actually promotes the expression, and in that context it has to be balanced against these other concerns. Is somebody to be able to say it is my first amendment right, if I own a Picasso, to paint a moustache on it and to hell with him? I don't think so.

Somewhere along the line you can draw those lines. We do it in other areas—fire in a crowded theater, whatever it is—you can do it here. You do it carefully. You do it with great deference to that first amendment. But you do it.

Mr. **Hughes**. As long as we have compelling governmental interests to look at.

Mr. **Walton**. That is right.

Mr. **Silverstein**. Mr. Hughes, may I comment on it?

Mr. HUGHES. Yes. Sure. Please.

Mr. SILVERSTEIN. Perhaps it is a little different perception, although I certainly agree with what my colleague, Mr. Walton, has said. Frank Capra, who was the great director of "It's A Wonderful Life," "Mr. Smith Goes To Washington," "Mr. Deeds Goes To Town," all those marvelous films, once said to me, "I couldn't have made those films in another country because the air smells different here." Now what he meant was the environment was different in the United States. Not necessarily speaking in a "qualitative way," but in a "different way." Our way of life allowed him to do it. The way of life that Congress has protected through enactment of legislation which protects those guarantees that we have in the Constitution.

You ask us to go to war occasionally. You tax us and yourselves in order to support that way of life. Certainly one component of that way of life, along with the business community and the scientific community and the academic and critical communities, is the artistic community. And you require, through the copyright law, that the artists who functioned in that environment, which the public as a whole has paid to create, that those artists must return the benefits of that environment after a certain period of time to the general public. The public should get back what it paid for, what it invested in. What it paid for with its taxes, conceivably with other sacrifices. And allowing defacement of the films does not give back the public what it originally paid for, what that way of life produced, and what future generations should see.

So, when the question is asked, Should Congress get into this act? there is no other group in the country that should get into the act other than Congress. One of its charges is to protect that way of life and to protect that environment in which free speech, including the free speech of artists, should be protected and allowed to flourish.

Mr. HUGHES. Well, Mr. Silverstein, you are eloquent. And you must concede that it is a great country and you have had, proudly, an equal opportunity today to argue the moral rights that you have with the Film Preservation Act.

Mr. SILVERSTEIN. And I thank you, sir, for it.

Mr. HUGHES. And you have done an excellent job of grabbing every opportunity.

Mr. Counter, with the relatively minor changes that you recommend, the Motion Picture Association of America supports the legislation before us, does it not?

Mr. COUNTER. Yes, as well as the Alliance of Motion Picture and Television Producers.

Mr. HUGHES. Since the key provisions of the bill include the National Film Registry and the selection of a given number of films annually for inclusion in that Registry, I take it that that extends to those provisions as well?

Mr. COUNTER. Yes.

Mr. HUGHES. Is the Motion Picture Association of America a member of the Committee for America's Copyright Community?

Mr. COUNTER. Yes.

Mr. HUGHES. Last night, I received a letter from the Committee for America's Copyright Committee opposing the key provisions of the bill. The letter states that the Registry in the selection of a classic film annually for the Registry are provisions which are not only not essential but more importantly they perpetuate one of the key vices under current law placing the Librarian in the position of making qualitative decisions about the relative merits of the various motion pictures.

Did your organization participate in that particular position taken by America's Copyright?

Mr. COUNTER. That particular provision generated a great deal of debate within our companies, I must confess, because there is certainly a feeling among the companies and particularly in the intellectual property areas and people who have dealt in those areas for many years that even in this limited way we are running afoul of some of the purposes of the copyright laws.

Mr. HUGHES. So the MPAA basically disagrees with it?

Mr. COUNTER. On balance, the companies came out, you know, not objecting to the statement.

Mr. HUGHES. I see.

Mr. COUNTER. But it was a close—I mean, it is not an easy question within our companies, I must tell you.

Mr. HUGHES. Well, that is all the questions I have. You have been an excellent panel. We appreciate your invaluable contributions. You have given us a lot to think about, and we are deeply indebted to you. Thank you very much.

That concludes the hearing for today and the subcommittee stands adjourned.

[Whereupon, at 12:33 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

COPYRIGHT RENEWAL ACT OF 1991
(Copyright Renewal)

THURSDAY, JUNE 20, 1991

House of Representatives,
Subcommittee on Intellectual Property
and Judicial Administration,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:06 a.m., in room 2237, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, George E. Sangmeister, Carlos J. Moorhead, Howard Coble, F. James Sensenbrenner, Jr., and Craig T. James.

Also present: Hayden W. Gregory, counsel; Michael J. Remington, assistant counsel; Edward O'Connell, assistant counsel; Phyllis Henderson, staff assistant; and Joseph V. Wolfe, minority counsel.

Mr. Hughes. The Subcommittee on Intellectual Property and Judicial Administration will come to order.

The Chair has received a request to cover this hearing in whole or in part by television broadcast, radio broadcast, still photography, or by other similar methods. In accordance with committee rule 5(a), permission will be granted unless there is objection. Is there objection?

[No response.]

Mr. Hughes. Hearing none, permission will be granted.

Good morning. The subcommittee this morning is holding a third hearing on H.R. 2372, the Copyright Amendments Act of 1991.

The subcommittee will explore title II of the bill, which amends the Copyright Act to provide for the automatic renewal of copyrights secured on or after January 1, 1963 through January 1, 1978, the effective date of the Copyright Revision Act of 1976. The subcommittee previously received testimony on titles I and III relating to fair use and film preservation.

The 1976 revision abandoned the affirmative renewal requirement for copyrights created after January 1, 1978. As a general rule, these copyrights now exist for the life of the author plus 50 years. Under previous law, failure to apply and renew a copyright in the 18th year meant that protection was forever lost.

Copyrights in their first term on January 1, 1978, were given a statutory term of 28 years from the date originally secured. After this period, they could be renewed for an additional 47 years, but this must be an affirmative renewal.

The Copyright Office testified just last week that the public interest would be best served by making the 47-year renewal automatic when the original 28-year term begins to expire on January 1, 1992.

The public interest would ordinarily be served by affirmative registration of renewal. For example, registration facilitates the location of current copyright owners so that interested parties may negotiate licensing or other use. However, the harshness of the sanction for failure to affirmatively renew—irretrievable loss of protection—coupled with the probability that some innocent parties inadvertently suffer, leads to the automatic renewal proposal.

As a consequence of the constitutional clause that empowers Congress to pass laws promoting the progress of science and the useful arts by securing for limited times to authors the exclusive rights to their writings, American copyright jurisprudence represents a statutory balance between the public interest and the proprietary rights of authors.

As part of the balancing equation, proponents of legislative proposals must identify a problem and craft a solution to the problem in the narrowest possible way. The solution must be defined in terms of what it is and what it is not.

The renewal proposal is designed to prevent copyrighted work from unintentionally falling into the public domain due to failure to renew. It, however, is broadly drafted so as to cover all published copyrighted works, irrespective of whether they were originally registered or not. Questions will be asked about the merits of this broad approach. Additional questions will be posed about the existence of constitutional authority to extend terms in existing copyrights.

Members may also wish to inquire about the concept of the public domain. As the Supreme Court recently noted in *Bonito Boats, Harper & Row*, and *Feist*, the public domain is an integral part of the social bargain inherent in copyright law. It is one of the general benefits received by the public in exchange for providing protection to authors. Authors, however, often view it as a dark and foreboding place.

I want to tell you that it's an interesting area. We look forward to the testimony from a distinguished list of witnesses this morning.

The Chair at this time will recognize the gentleman from Florida, the distinguished ranking Republican of the subcommittee.

Mr. MOORHEAD. You've moved me about 3,000 miles east.

Mr. HUGHES. California—sorry about that.

[Laughter.]

Mr. MOORHEAD. Well, thank you, Mr. Chairman.

Today we turn our attention to title II of H.R. 2372, which deals with automatic renewal of copyrights secured from 1963 to 1977. As others have pointed out, perhaps the best statement of need to address the inequities caused by the two-term renewal system is found in the House report on the 1976 Copyright Revision Act. In that report, the Judiciary Committee noted that one of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it's the cause of inadvertent and unjust loss of copyright.

Title II of H.R. 2372 represents an innovative solution to the problems caused by the two-term renewal system. Today we have a very distinguished panel of witnesses to help us understand all of the ramifications of this proposal, and I look forward to their testimony.

I will be gone for about 10 or 15 minutes because I have a markup, but I hope to be right back. Thank you.

Mr. HUGHES. I thank the gentleman from California.

Does the gentleman from Florida have an opening statement?

Mr. JAMES. Yes. I'm looking forward to hearing the testimony. I, too, will have to leave for some period of time, but I'm going to be listening very carefully to testimony as to: Are there any vested rights that are being interfered with? If there is not, I don't see why it didn't happen before I got on the committee. I don't know why we haven't already changed the law to make it consistent, to keep it from being an unwary trap for those who may just overlook technicalities of the law. So it would seem a shame not to proceed in that direction unless and until I hear of some actually vested right that is otherwise interfered with.

I'm not too sensitive to an opportunist who may otherwise try to take advantage of the law, but if there are vested rights, I want to hear about them.

Thank you so much.

Mr. HUGHES. I thank the gentleman.

I, too, want to apologize. There are a lot of markups today, which is basically reporting out legislation. It goes through the amending process in committee. A number of us will have to step out for brief periods of time during the markup of those bills. For instance, I have to attend a markup on striped bass, which is very important in my congressional district, representing an area that has a lot of—well, not as many striped bass as we'd like these days.

[Laughter.]

Mr. HUGHES. That's the problem. So, you'll see members in and out. It's not because it's not an important subject, but they have other duties to attend to.

Does the gentleman from Illinois have——

Mr. SANGMEISTER. No statement.

Mr. HUGHES. Now I'd like to introduce a panel of illustrious witnesses who will testify about the automatic copyright renewal proposal.

Our first three witnesses represent performing arts societies: First, Mr. Morton Gould is president of the American Society of Composers, Authors and Publishers. ASCAP represents over 50,000 members. In his own right, Morton Gould is one of the Nation's most famous composers and conductors, and we're delighted to see him with us here today.

Second, the subcommittee will hear from Ms. Frances Preston, president of Broadcast Music, Inc., BMI, which represents over 120,000 writers, composers, and publishers. Ms. Preston will introduce to the subcommittee the widow of a songwriter whose song "Little Bitty Pretty One" is now in the public domain due to a failure to renew the copyright.

Third, testimony will be received from Mr. Vincent Candilora, president of SESAC, Inc., a smaller society which represents the rights of creative talent out of the mainstream of contemporary music. Mr. Candilora is well known in the music community, residing in Nashville, TN, and serving on the Country Music Association board of directors.

Fourth, the subcommittee will hear from Mr. George David Weiss, president of the Songwriters Guild of America. Several famous songs written by Mr. Weiss, such as "Can't Help Falling in Love," "The Lion Sleeps Tonight," are not in the public domain, I don't think.

Last, but certainly not least, Mr. Irwin Karp appears on behalf of the Committee for Literary Property Studies, an informal group of authors, academics, literary agents, and attorneys. The committee originally crafted the legislative proposal before us this morning.

We have copies of your statements which, without objection, will all be made a part of the record in full. We've read your statements. We hope you can summarize, but you may proceed as you see fit.

I understand that you have decided the order of speaking. So we'll first recognize Ms. Preston. Welcome.

STATEMENT OF FRANCES W. PRESTON, PRESIDENT AND CHIEF EXECUTIVE OFFICER, BROADCAST MUSIC, INC., ACCOMPANIED BY JACQUELINE BYRD, WIDOW OF BMI SONGWRITER ROBERT BYRD

Ms. PRESTON. Thank you. Good morning, Mr. Chairman and members of the subcommittee. My name is Frances W. Preston. I'm president and chief executive officer of BMI. BMI represents more than 120,000 songwriters, composers, and music publishers, the world's largest grouping who have collectively created more than 2 million copyrighted musical compositions.

BMI strongly supports title II of H.R. 2372, which would automatically renew pre-1978 copyrights. Current copyright law requires that a work enter the public domain if a renewal registration form is not filed. This legal formality creates an atmosphere of uncertainty and ambiguity. Further, I believe enactment of H.R. 2372 would enhance our Berne Convention status.

But, rather than take your time with BMI's formal statement, I will submit it for the written record, of course, and I will be happy to respond to written questions if requested to do so by the Chair or other members of the subcommittee. Instead, I want to present to you a woman who exemplifies in human terms the tragic circumstances that failure to meet compulsory renewal registration produces and whose story, I am sure, will convince you that this amendment to the copyright law is both appropriate and necessary.

Her name is Jacqueline Byrd. She is the widow of BMI songwriter Robert Byrd. Robert's song "Little Bitty Pretty One" has been performed more than a million times on American radio. Unfortunately, it is now in the public domain in this country because it was not renewed. The legacy that Robert Byrd had hoped to leave to his wife and children was eliminated through someone else's failure to renew.

Mr. Chairman and members of the subcommittee, I would like to introduce Jacqueline Byrd. Thank you.

[The prepared statement of Ms. Preston follows:]

PREPARED STATEMENT OF FRANCES W. PRESTON, PRESIDENT AND CHIEF EXECUTIVE OFFICER, BROADCAST MUSIC, INC.

Broadcast Music, Inc. (BMI) is the largest performing rights organization in the world. BMI represents over 120,000 writers, composers and publishers who have created more than 2 million copyrighted musical compositions.

Some of the songwriters and composers affiliated with BMI include Paul Simon, Michael Bolton, Billy Joel, Carole Bayer Sager, Michael Jackson, Willie Nelson, Gunther Schuller, William Schuman, Ellen Taffe Zwilich, John Kander, Fred Ebb, Charles Fox and Mike Post. On behalf of these and all the other creators of music whose works are licensed by BMI, BMI expresses its strong support for Title II of H.R. 2372, which would make the applicable copyright renewal term automatic, and submits this statement for the record.

When the Copyright Act of 1976 was passed, thousands of works were in their first term of copyright. Rather than develop a method to integrate those transitional works into the new law, Congress retained the renewal registration requirement in Section 304(a) of that Act. By doing so, those works attained a contingent status different from anything created in America since 1978--if they are not renewed, they would fall into the public domain forever.

The very fact that the renewal system was eliminated for post-1977 creations is some indication that Congress was convinced that a single term of copyright was preferable to the

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method under prior law. Certainly, providing the benefits of copyright protection immediately upon creation and having them last for half a century beyond the creator's death emphasizes the fervor with which Congress sought to benefit copyrighted works. By doing so, Congress has given works created under the current law a significant special value not afforded to earlier creations--they are secure in their protection and the remuneration passed to their owners and creators and their heirs for a definite time, not subject to being divested because of a race against the clock. Without a doubt, the same concept that envelopes these newer works in a blanket of copyright security entitles prior creations to like treatment. This bill would adjust the equities, so that no American copyright is treated differently simply because of its time of creation.

What is most ironic about the issue under consideration is the fact that in most foreign countries, where a single term of copyright for the life of the author plus fifty years after his death has long existed, a copyright which has fallen into the public domain in this country may still be protected. This bill will eliminate this domestic discrimination and allow the country of creation to protect a work for a length of time that fairly approximates the coverage given to copyrights elsewhere around the world. We will thus enhance our compliance with the Berne Convention, which prohibits formalities from affecting copyright protection.

Unlike most other creators of intellectual property, active writers and composers of music create hundreds of works in a lifetime. As a result, they have particular difficulty in renewing their copyrights. Many years ago they could rely on their publishers to keep track of renewal dates. Music publishing companies were small, family operations that were not overwhelmed by the number of copyrights that needed to be monitored. Of course, even in that era, if a publisher was essentially a one-man operation, renewal monitoring could become impossible, as Jacqueline Byrd's testimony on this bill indicated.

Today, on the other hand, music publishing companies are sold and re-sold, and the opposite effect occurs: a publishing conglomerate which has the works in its repertoire at renewal time typically no longer has a system to monitor renewal dates of the thousands of works it handles. Thus, the renewal registration requirement works against copyright owners in various contexts. The result is the same, however; if one misses the deadline, there is no second chance.

Many of the most popular songs in the BMI repertoire were first copyrighted between 1963 and 1977, the time period affected by this legislation. If Title II of H.R. 2372 becomes law, works such as "Never My Love," "Bridge Over Troubled Water, "Goin' Out of My Head, "King of the Road", "Killing Me Softly With His Song, "Love Will Keep Us Together" "Tie A Yellow Ribbon

Round the Old Oak Tree" and dozens of others of equal renown will continue to assure their creators of remuneration for their success, without the worry that it might all be lost due to an inadvertent oversight.

American music has always contributed greatly to the positive balance of trade that intellectual property generates for the United States. In dozens of countries around the world, songs created in this country have become popular in both English-language and translated versions. In light of such worldwide acceptance of these works, to deprive any number of their creators of just compensation because of an administrative error is indeed harsh.

This bill will still encourage the filing of renewal registrations by preventing the prima facie presumption of validity of the copyright from attaching without it, and by allowing derivative works to be used during the renewal term without permission unless a renewal is filed. However, if one forgets to renew, every right the Copyright Act gives the copyright owner will not be lost at the stroke of midnight of December 31st of the 28th year. For that reason alone, this bill deserves to become law.

Only those works now between 14 and 28 years old are involved and no works which have already fallen into the public domain will be revived. Title II of H.R. 2372, which has no significant opposition, will repair an anomaly in the Copyright

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Act. The House and Senate Judiciary Committees called that aberration the "worst feature" of the old law. This proposed amendment to the Copyright Act will allow the fruits of the creators of American films, songs, plays and books created between 1963 and 1977 to be enjoyed without worry for as long as those which were created later, relieving an important body of intellectual property of an undeserving burden. Had the matter been fully analyzed at the time the Copyright Act of 1976 was enacted, it would likely have been addressed at that time. That oversight should be corrected now, before any more American copyrights suffer unjustly.

Respectfully submitted,
Frances W. Preston
President and Chief
Executive Officer
BROADCAST MUSIC, INC.
320 West 57th Street
New York, NY 10019

Mr. SANGMEISTER [presiding]. Welcome, Mrs. Byrd. You may proceed.

STATEMENT OF JACQUELINE BYRD, WIDOW OF SONGWRITER ROBERT BYRD

Mrs. BYRD. Good morning, Mr. Chairman and members of the subcommittee. I am Jacqueline Byrd. I wanted to come to Washington from California today to tell you what happened to me and my family. I thank you and your staff for letting me speak today.

My late husband, who wrote songs under the name of Robert Byrd and performed and made records as Bobby Day, wrote "Little Bitty Pretty One" in 1957. He took his song to a small publisher in Los Angeles who liked it, and Bobby gave him the original and renewal copyright in return for a royalty contract. It became a hit. It is still played on radio and television in this country and around the world. Although Bobby wrote over 40 songs during his lifetime, only three were really successful. "Little Bitty Pretty One" was the greatest, the biggest hit of all. It never brought us a fortune, but even a few thousand dollars a year was important to us with four children, one daughter with cerebral palsy.

In 1982, the publisher that owned "Little Bitty Pretty One" died. His widow was a woman over 80 years old. She was left with the publishing company and all its copyrights. Bobby didn't know anything about renewals. He figured that the publisher would take care of whatever had to be done with the copyright, but the publisher's widow didn't know she had to renew "Little Bitty Pretty One."

One day last summer, we learned that my husband had cancer. Around the same time, Bobby got a letter from BMI which I opened. I couldn't believe what I was reading. The letter said BMI learned from the Copyright Office that "Little Bitty Pretty One" had not been renewed, so they had to stop paying Bobby his U.S. royalties. I was so shocked I couldn't even tell my husband.

I called the widow who owned the publishing company, and she said that she had gotten the same letter from BMI telling her that she had lost her share of U.S. royalties, too. All she could say to me was that she hoped that this whole horrible matter would somehow work itself out. I'm sure now she knows it won't.

What is even sadder for her is that she lost another big song that she herself wrote and published, "Rockin' Robin," a song that was a hit recording for my husband.

I never did have the heart to tell Bobby what had happened. He died thinking that his royalties would take care of his family for a long time. I am thankful that at least we will get a little money from foreign countries where the copyright is still protected.

Had "Little Bitty Pretty One" been renewed on time, my family could have counted on royalties from it until the year 2032. That would have been a wonderful inheritance for Bobby's children and grandchildren.

What makes our problem even harder to accept is that if Bobby wrote this song after 1977, we would get his royalties automatically for 50 years. Instead, "Little Bitty Pretty One" became part of a special unlucky class of songs with a terrible penalty attached to them: Renew them or lose them.

I don't believe you really meant to have so many popular song copyrights treated differently simply because of when they were created. With Bobby's salary as a performer gone and my ill daughter, now is the time when I could use his song royalties the most. It should have been many years before this song became public domain. If copyright protection is to benefit a writer's family after he dies, it is a very severe punishment to lose a song forever if you don't file a piece of paper. I always believed that the few hit songs that my husband wrote would be valuable to me and my family. Instead, that was all lost on a legal technicality.

I hope you will remember my story of two widows caught in a time trap that threw our copyrights away by mistake. You can help all other songwriters and their families whose songs still have a chance to be saved. Please make this bill the law so that they can have the peace of mind to know that somebody's mistake won't make a copyrighted song and its royalties disappear into public domain. Thank you.

Mr. SANGMEISTER. Thank you, Mrs. Byrd.

[The prepared statement of Mrs. Byrd follows:]

STATEMENT OF JACQUELINE BYRD,
WIDOW OF SONGWRITER ROBERT BYRD

Good morning, Mr. Chairman and members of the subcommittee.

I am Jacqueline Byrd. I very much wanted to come to Washington from California today to tell you what has happened to me and my family, and I thank you and your staff for the privilege of allowing me to speak to you.

The current law of renewals greatly affects people as much as copyrights. I know that nothing I will say can bring back the copyright that we have lost. But I sincerely hope that you will pass this bill to help all the other songwriters and their families whose songs still have to be renewed from ending up in the same kind of situation that has happened to us.

My late husband, who wrote songs under the name of Robert Byrd, and performed and made records as Bobby Day, wrote "Little Bitty Pretty One" in 1957. You may not recognize the title, but I'm sure you would know the song if you heard it, and I have a tape of it with me if you would like to hear it later. We had two children at the time, and we just moved into our first house. We didn't even have any furniture. One night Bobby just sat down on the floor in the corner and sang a song to me into his tape recorder. He told me that I was a "Little Bitty Pretty One," so that song was always special to me.

Bobby took his song to a small music publisher in Los Angeles for whom he had made a record the year before. The publisher liked the song and, as is the usual way of doing things in the music business, Bobby gave him the original and renewal copyright in return for a royalty contract. Both Bobby and

Thurston Harris recorded "Little Bitty Pretty One" and it became a hit. It has been played regularly on radio and television in this country and around the world ever since.

Bobby got royalties from BMI for many years on this and his other songs and we always counted on them. Although he wrote over 40 songs during his lifetime, only three were really successful and "Little Bitty Pretty One" was the most successful of all. It never brought us a fortune, but even a few thousand dollars a year was important to us with four children, one a daughter with cerebral palsy.

In 1982 the publisher that owned "Little Bitty Pretty One" died, and his widow, who was a woman over 80 years old, was left the business and all the songs her husband owned, including Bobby's. My husband didn't know anything about renewal registration, since he figured, as I'm sure many songwriters do, that the publisher would take care of whatever had to be done with the copyright since it belonged to him. But the publisher's widow either forgot or didn't know she had to renew "Little Bitty Pretty One" when the time came to do it.

One day last summer my husband got very sick, and we learned he had cancer. Around the same time Bobby got a letter from BMI which I opened. I couldn't believe what I was reading. The letter said that BMI found out from the Copyright Office that "Little Bitty Pretty One" wasn't renewed and so they had no choice but to stop paying Bobby his royalties. I was so shocked that I couldn't even tell my husband. I called the widow who

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owned the song and she said that she got the same letter telling her that she had lost her share of royalties, too. All she could say to me was that she hoped that this whole, horrible matter would somehow work itself out. I'm sure she now knows that it won't. What is even more distressing for her is that she lost to non-renewal another major song copyright that she not only owned but also had written.

I never did have the heart to tell my husband what had happened. Bobby died last July, thinking that his royalties would help take care of his family for a long time.

Had "Little Bitty Pretty One" been renewed on time, my family could have counted on income from it until the year 2032. That would have been a wonderful inheritance for Bobby's children and grandchildren. What makes our predicament all that more difficult to accept is that if my husband had written this song 21 years later than he did, none of this renewal paperwork would matter and we would automatically be receiving his royalties for 50 years.

However, because "Little Bitty Pretty One" was written when it was, it became instead part of a special unlucky class of songs which have a terrible penalty attached to them--watch them or lose them. In our case, nobody was watching. I don't think you meant to have so many popular songs treated so differently simply because of when they were created.

With Bobby's money from performing gone and an ill daughter, now was when I could have used his song royalties the most. I wouldn't be surprised to soon hear "Little Bitty Pretty One" on the radio, and in commercials and on new records, and my family and I won't have any part of the money that Bobby's creation will make for other people, many years before it should have been part of the public domain. If copyright protection was supposed to last long enough for a writer's family to benefit from his work after he dies, having somebody who doesn't know any better lose their song forever if they don't file a piece of paper at a certain time is a very severe punishment. Until "Little Bitty Pretty One" accidentally fell into the public domain, I always believed that the few successful songs that my husband had written had attained a value that went beyond being lost on a technicality.

I hope you will remember my story of two widows caught up in a time trap that threw our copyright away by mistake. You can help all the other songwriters and their families whose songs still have a chance to be saved. Please make this bill the law so that they can have the peace of mind to know that somebody's slip-up won't make a copyright and its royalties pass on before they should.

Thank you.

Mr. SANGMEISTER. We're going to hold questions for all of you until everyone's statement has been entered into the record, and then we'll proceed.

Mr. Gould, would you go ahead, please?

STATEMENT OF MORTON GOULD, PRESIDENT, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ACCOMPANIED BY BERNARD KORMAN

Mr. GOULD. Mr. Chairman, members of the subcommittee, good morning. Thank you for giving me the opportunity to talk about this proposed copyright renewal bill.

My name is Morton Gould. I am a composer, conductor, and currently in my 6th year as president of ASCAP, the American Society of Composers, Authors and Publishers. You have my statement. You can credit me with whatever you want or not; I won't mention them; all right? Whatever I did, I did; it's done; it's there. So, let me get on to the point of this, which is the issue itself.

I'm appearing here on behalf of about 50,000 ASCAP members and many others from different parts of the world who are also involved, although indirectly, with this issue. This membership includes not only currently live writers, but obviously widows, estates, and heirs of some of America's greatest creators: Irving Berlin, Leonard Bernstein, Aaron Copeland, Duke Ellington, George and Ira Gershwin, to name just a few. On our board of directors are people such as Marilyn Bergman, Sammy Cahn, Cy Coleman, Hal David, Burton Lane, along with writers like Jon Bon Jovi, Neil Diamond, Amy Grant, Lionel Richie, Smokey Robinson, Diane Warren, Stevie Wonder. This just names a few. But it's not only these names, both gone and still living; it's also the countless other names. You've just heard eloquent testimony as to what some of the results are from the lack of this kind of protection.

As I've written to you, Mr. Chairman, we know that there are other organizations that are in support of the bill, the Association of American Publishers, the Authors League of America, the Dramatists Guild, the Motion Picture Assocation of America, the National Music Publishers Association, and three organizations represented on this panel: Broadcast Music, Inc.; SESAC; and the Songwriters Guild of America. They can't all be wrong. The International Confederation of Authors' Societies is also on record supporting the principle of automatic renewal.

Mr. Chairman, you have received the statements of Mr. Ralph Oman, the Register of Copyrights, and Mr. Irwin Karp, for many years the learned counsel to the Authors League. As experienced legal scholars familiar with the intricacies of copyright law, they have spelled out the arguments in favor of your proposal, Mr. Chairman, in which you summarized the reasons for this legislation. As I see it, they really boil down to one: Your bill is needed to avoid injury to unwary creators and their unsuspecting survivors who are intended and ought to be their beneficiaries.

Composers write music and generally rely on others to look after compliance with the copyright laws to see to it that our works are protected. If we are among the fortunate few who are successful enough to be able to afford to pay knowledgeable copyright lawyers, our works are protected. Or, if we are knowledgeable enough to have the Songwriters Guild of America watch for renewal dates and alert us to the need to renew, our works are protected.

But many writers are not so fortunate, and most rely on publishers to renew for them. Indeed, publishers often require composers to grant rights for both the original and the renewal terms and have the contractual right to renew in our names, if we are living in the 28th year.

Now I know from personal experience. For a lot of obvious reasons I don't want to go into all the details, because it would take up too much time, but writers' faith in publishers sometimes has been misplaced for one reason or another. Unknown to composers, including people like myself, works have not been renewed. Of course, once a work enters the dark public domain that you mentioned before, it never sees the light of copyright protection.

There are also instances in which rights were granted to publishers for the original term only, and when renewal term arrives 28 years later, the writer is gone and no one has been alerted to the need to renew.

Even when there are knowledgeable people in the picture, the renewal clause has caused problems. ASCAP's general counsel, who is with me today, tells me of a case years ago where the writer had died without a widow or children. The person with renewal rights was his executor. The estate had been wound up. The executor was ready and wanted to be discharged, but there were many works still to be renewed, some as distant in time as 28 years.

The solution, necessitated by the renewal provision, was to discharge the executor for all purposes except one: to renew copyrights. To me, it seems extraordinary that the copyright law would prevent an estate from being finally distributed and the executor discharged. And, if the executor had died within 28 years, it would have been necessary to have another one appointed, to post a bond, and to go through a whole rigamarole in surrogate's court.

Mr. Chairman, for reasons we all know very well, your bill should be enacted simply to avoid the inadvertent or negligent loss of rights in property that writers create. In music, the vast majority of works that earn money are, and will continue to be, renewed by registration. Your bill will save an unknown and unknowable number of works. It will also, in all probability, avoid a number of personal tragedies in which authors or their heirs will suffer loss of income because of a technical trap. Thus, Mr. Chairman, your bill is not aimed at helping the rich grow richer. Rather, it is aimed at protecting the innocent from unwarranted and unjust and unfair injury and loss.

Congress recognized in 1976 for all new works that the renewal provision was a bad idea whose time had passed. Your bill extends that recognition to works created in the years 1963 through 1977. We think it is so clearly fair that the wonder is why it was not thought of long ago.

Mr. Chairman, ending on a personal note, if I may, I must say that as a composer I yearn to be in the public ear, but not in the public domain.

[Laughter.]

Mr. GOULD. Without this bill, as a parent it would be like losing custody of a child because you forgot his or her birthday, which has happened to me a number of times. I have four of them.

[Laughter.]

Mr. GOULD. Mr. Chairman and subcommittee members, I appreciate the privilege to appear and testify today. Thank you.

Mr. SANGMEISTER. You're more than welcome for that.

[The prepared statement of Mr. Gould follows:]

PREPARED STATEMENT OF MORTON GOULD, PRESIDENT, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Mr. Chairman and members of the Subcommittee: Good morning and thank you for giving me the opportunity to be heard on your proposed Copyright Renewal Bill, H.R. 2372.

My name is Morton Gould. I am a composer and conductor.

For six years I have had the honor of serving as the President of the world's foremost performing rights society--the American Society of Composers, Authors and Publishers (commonly known as ASCAP). I have been a member of the Society since 1935 and a member of ASCAP's Board of Directors for 32 consecutive years.

My works have been widely performed and recorded over the years, by some of our greatest conductors--among them Arturo Toscanini, Leopold Stokowski, Dimitri Mitropoulos, and Fritz Reiner. My better-known symphonic works include: American Salute, Pavanne, from my Second Symphonette, Latin-American Symphonette, Spirituals for Orchestra and Tap Dance Concerto. I wrote ballet scores for George Balanchine, Jerome Robbins and Agnes DeMille. I have also written music for two Broadway musicals--Arms and the Girl and Billion Dollar Baby--film scores for Delightfully Dangerous, Windjammer, and Cinerama Holiday, and television scores for Holocaust, F. Scott Fitzgerald in Hollywood and CBS' World War I Documentary Series.

In 1966, I received a Grammy Award for a classical album of Charles Ives' First Symphony with the Chicago Symphony Orchestra. I have also received 12 Grammy nominations.

In 1983, the American Symphony Orchestra League honored me with its Gold Baton Award and in 1985, I was presented the National Arts Club's Medal of Honor for Music. In 1986, I was elected to the American Academy and Institute of Arts and Letters, and received the National Music Council's Golden Eagle Award.

I appear before you today on behalf of nearly 50,000 ASCAP members and hundreds of thousands of foreign creators and publishers. The membership includes the widows, estates and heirs of some of America's greatest creators--Irving Berlin, Leonard Bernstein, Aaron Copland, Duke Ellington and George and Ira Gershwin, to name just a few. Today's greatly talented members include ASCAP Board members Marilyn Bergman, Sammy Cahn, Cy Coleman, Hal David and Burton Lane, along with such songwriters as John Bon Jovi, Neil Diamond, Amy Grant, Lionel Richie, Smokey Robinson, Diane Warren and Stevie Wonder, again to name only a few. I also appear before you on behalf of countless other songwriters whose names are not familiar to you, but whose music is widely performed.

As I have written to you, Mr. Chairman, and to all of the members of the House and Senate Judiciary Committees, a number of important organizations in addition to ASCAP are on record as supporting your bill. They include: the Association of American Publishers (AAP); the Authors League of America; the Dramatists Guild; the Motion Picture Association of America (MPAA); the National Music Publishers Association (NMPA); and three organizations represented on this panel--Broadcast Music Incorporated (BMI); SESAC; and the Songwriters Guild of America.

The International Confederation of Authors' Societies is also on record supporting the principle of automatic renewal.

Mr. Chairman, you have received the statements of Mr. Ralph Oman, The Register of Copyrights, and Mr. Irwin Karp, for many years the learned counsel to the Authors League. As experienced legal scholars familiar with the intricacies of Copyright Law, they have spelled out the arguments in favor of your proposal.

As I see it, they really boil down to one: your bill is needed to avoid injury to unwary creators and their unsuspecting survivors who are intended and ought to be their beneficiaries.

Composers write music and generally rely on others to look after compliance with the Copyright Law to see to it that our works are protected. If we are among the fortunate few who are successful enough to be able to afford to pay knowledgeable copyright lawyers, our works are protected. Or, if we are knowledgeable enough to have the Songwriters Guild of America watch for renewal dates and alert us to the need to renew, our works are protected.

But many writers are not so fortunate. And most rely on publishers to renew for them. Indeed publishers often require composers to grant rights for both the original and the renewal terms and have the contractual right to renew in our names, if we are living in the 28th year.

I know, but for obvious reasons cannot disclose, that writers' faith in publishers has sometimes been misplaced. Unknown to composers, works were not renewed. And, of course, once a work enters the dark public domain it never again sees the light of copyright protection.

There are also instances in which rights were granted to publishers for the original term only and, when renewal time arrives 28 years later, the writer is gone and no one has been alerted to the need to renew.

Even when there are knowledgeable people in the picture the renewal clause has caused problems. ASCAP's General Counsel, who is with me today, tells me of a case years ago, where the writer had died without a widow or child. The person with renewal rights was his executor. The estate had been wound up. The executor was ready and wanted to be discharged. But there were many works still to be renewed, some as distant in time as 28 years.

The solution--necessitated by the renewal provision--was to discharge the executor for all purposes except one: to renew copyrights. To me, it seems extraordinary that the copyright law would prevent an estate from being finally distributed and the executor discharged. And, if the executor had died within 28 years, it would have been necessary to have another one appointed, to post a bond and to go through a whole rigamarole in Surrogate's Court.

Mr. Chairman, for reasons we all know very well, your bill should be enacted simply to avoid the inadvertent or negligent loss of rights in property that writers create.

In music, the vast majority of works that earn money are and will continue to be renewed by registration. Your bill will save an unknown and unknowable number of works. It will also, in all probability, avoid a number of personal tragedies in which authors or their heirs will suffer loss of income because of a technical trap.

Thus, Mr. Chairman, your bill is not aimed at helping the rich grow richer. Rather, it is aimed at protecting the innocent from unwarranted injury.

Congress recognized in 1976 for all new works that the renewal provision was a bad idea whose time had passed. Your bill extends that recognition to works created in the years 1963 through 1977. We think it is so clearly fair that the wonder is why it was not thought of long ago.

Mr. SANGMEISTER. Mr. Weiss.

STATEMENT OF GEORGE DAVID WEISS, PRESIDENT, SONGWRITERS GUILD OF AMERICA

Mr. WEISS. Mr. Chairman and members of this subcommittee, thank you for this opportunity to submit my statement on your proposed copyright renewal bill, H.R. 2372. I'm George David Weiss, president of the Songwriters Guild of America, SGA, and I'm testifying on behalf of our approximately 5,000 members.

On a personal note, sir, I hope you will tell the new chairman when he returns that, as a long-time resident of the great State of New Jersey, I'm pleased and honored to welcome him to his new position as chairman of this subcommittee before which I have appeared so often in the past. I'm certainly pleased and honored to have a member of my State here.

Mr. SANGMEISTER. We'll tell him that, and I'm sure it will help you.

[Laughter.]

Mr. WEISS. Please. Thank you. That's why I said it.

[Laughter.]

Mr. SANGMEISTER. I understand.

Mr. WEISS. SGA, which celebrated its 60th anniversary this year, maintains offices in New York, Los Angeles, and Nashville. For over 50 years, SGA, previously known as the American Guild of Authors and Composers, AGAC, has steadfastly maintained a renewal copyright service for its members, including the estates of deceased members. It is the only songwriters' organization in America that maintains a copyright renewal service to enable its members to secure, on request, renewal of first-term copyrights. Each member is notified at least 12 months in advance of a pending renewal.

The renewal provisions of the 1976 act are a literal carryover from the 1909 act. The obligation to renew a copyright in its 28th year has always seemed somewhat of an anomaly to me. During the lifespan of my songwriting career, during which I have written such standards as "What a Wonderful World," "Can't Help Falling in Love," "The Lion Sleeps Tonight," Lullaby of Birdland," et cetera, I have been obliged to file a renewal certificate in the 28th year, failing which my life work enters the public domain, depriving me of all income.

What rational basis could have existed in the minds of those who drafted the 1909 bill to impose such a draconian hardship on me? If my act of creation was worthy enough to secure copyright, why should it be lost by my failure, inadvertent or otherwise, to file a piece of paper, which literally has no other function than to be a piece of paper? I suspect this requirement may have stemmed from the false belief that hastening the public domain status of copyrighted works serves some greater good.

Regrettably, many members wait until the last moment to furnish us with instructions to renew. In several cases of which I am personally aware, this resulted in near loss of copyright because our filing was not made until the last week in December, leaving at most, 7 days between copyright protection and the public domain.

Technical problems can result in loss of copyright which can arise when a song is published in 1963—but not registered until 1964. Regardless of the registration date, renewal—which is measured from the publication date—must in the cited case be effected before December 31, 1991. However, records of the copyright entries of the U.S. Copyright Office will only index the registration date; hence, a 1-year difference that results in loss of copyright.

It is that copyright entry book that all songwriters, if they are aware at all, will refer to to remind them when to renew. So, in such a case, when the publication date was in the prior year, they won't realize it. They're only going to look at the date of the registration; then they're too late.

What is the rationale for the renewal of copyright, America being the only country in the world that has such a requirement? Whatever theory was propounded in the 1909 law that required renewal has literally passed into history with the enactment of the 1976 act and with U.S. adherence to the Berne Union.

Both U.S. law and the Berne Convention are keyed to the elimination of as many technicalities as possible as a condition for securing and maintaining copyright. One may ask, "Who is the possible beneficiary of any work which, because of oversight, enters the public domain?" Certainly not the public. That is a time-honored, grave misconception, as evidenced by all of those classic books, records, and tapes whose contents have long entered the public domain and which carry the same, and in some cases greater, selling price than a fully protected work.

This committee has time and again heard from primary legal scholars who have lectured on the great common benefit derived by the public in works no longer protected by copyright. While this, like so many old wives' tales, has a ring of plausibility, it is not susceptible of scrutiny when subject to the light of day. Consider the following:

"Phantom of the Opera," written in 1910, entered the public domain in the United States in 1985, and it is still one of the hottest tickets in New York at a cost of over $50 per seat. Why? Because the cost factor in producing an intellectual property, be it a book, movie, cassette, or record, is not in the copyright royalty, which is always the lowest man on the totem pole, but in the amount paid for the services of the performer, for the printer, for the manufacturer, for the producer, et cetera.

There is no rationale for the renewal obligation. Its history has only produced sorrow, as you have heard today, for the unknowing, without any concomitant public benefit. Is it not time in the waning years when copyright must be renewed on pre-1978 works to acknowledge the antiquity and anomaly of renewal by abandoning it once and for all?

We urge speedy enactment of H.R. 2372. Thank you very much for this opportunity.

Mr. SANGMEISTER. You're welcome.

[The prepared statement of Mr. Weiss follows:]

PREPARED STATEMENT OF GEORGE DAVID WEISS, PRESIDENT, SONGWRITERS GUILD OF AMERICA

Mr. Chairman and members of the Subcommittee:

Thank you for giving me the opportunity to submit this statement on your proposed Copyright Renewal Bill H.R. 2372.

I am George David Weiss, President of the Songwriters Guild of America ("SGA"), and am testifying on behalf of our approximately 5,000 members.

SGA, which celebrated its 60th Anniversary this year, maintains offices in New York, Los Angeles and Nashville. For over fifty years, SGA (previously known as the "American Guild of Authors and Composers -- AGAC) has steadfastly maintained a Renewal Copyright Service for its members, including estates of deceased members. It is the only songwriters organization in America that maintains a copyright renewal service, enabling its members to secure, on request, renewal of first-term copyrights. Each member is notified at least twelve months in advance of a pending renewal.

The renewal provisions of the 1976 Act are a literal carry-over from the 1909 Act. The obligation to renew a copyright in its 28th year, has always been somewhat of an anomaly to me. During the life-span of my songwriting career (during which I have written such favorites as "WHAT A WONDERFUL WORLD", "CAN'T HELP FALLING IN LOVE", "LION SLEEPS TONIGHT" AND "LULLABYE OF BIRDLAND", I have been obliged to file a renewal certificate in the 28th year failing which my life-work enters the public domain -- depriving me of all income. What rationale basis could have existed in the minds of those who drafted the 1909 bill to impose such a draconian hardship on me? If my act of creation was worthy enough to secure copyright, why should it be lost by my failure to file a piece of paper, which literally has no other function. I suspect this requirement may have stemmed from the false belief that hastening the public domain status of copyrighted works serves some greater good!

However, once SGA realized the dire implications of failure to renew, it structured a renewal service for its members. In existence for over fifty years, the Service is run at below cost to its members, because of its tremendous importance. It should be looked upon as a dike stemming the rising tide of the public domain.

Regrettably, my members wait until the last moment to furnish us with instructions to renew. In several cases of which I am personally aware, this resulted in near-loss of copyright because our filing was not made until the last week in December -- leaving at most seven days between copyright protection and the public domain. Technical problems can result in loss of copyright, which can arise when a song is published in 1963 but not registered until 1964. Regardless of the registration date, renewal which is measured from the publication date, must in the cited case be effected before December 31, 1998. However, records of the Copyright Entries of the United States Copyright Office will only index the Registration Date -- hence a one-year difference that could result in loss of copyright.

While SGA takes pride in never having lost a copyright, we are aware of many books -- some of major historic significance -- which have not faired as well. Such a fate immediately cuts off vital revenue to creators whose entire lives may depend on a handful of copyrights as their sole means of support.

What is the rational for the renewal of copyright -- America being the only country in the world that has such a requirement? Whatever theory was propounded in the 1909 law that required renewal, it has literally passed into history with the enactment of the 1976 Act and with U.S. adherence to the Berne Union. Both U.S. law and The Berne Convnetion are keyed to the elimination of as many technicalities as possible as a condition for securing and maintaining copyright. This distinguished committee was so instrumental in effecting the 1976 Act, helped eliminate the following technical requirements which had negative aspects on maintaining copyright:

(i) The obligation to carry notice of copyright on each copy of a published work in certain defined locations.

(ii) The requirement that a work first published in the English language must be wholly manufactured in America.

(iii) That the splintering of certain rights which emanate from a copyright might cause it to fall into the public domain.

(iv) That the only way to be invested with copyright is to publish copies of a Work with a prescribed form of notice.

(v) That an incorrect year date in the copyright notice may be fatal to its protection.

(vi) The meaningful explanation of the definition of "publication" as a means to securing public registration of a copyrighted work; and above all

(vii) The recognition that regardless of technical details, copyright vests in the creator on the date of its creation.

By recognizing copyright as an act of creation, Congress invested authors with the power to preserve their copyright -- no longer reliant on third-party actions to invest them with protection.

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Why? Because the cost factor in producing any intellectual property -- be it a book, movie, cassette or record -- is not in the copyright royalty, but in the amount paid for the genius of the creator or for the services of the performer, printer and manufacturer.

The only beneficiaries of a copyright prematurely entering into the public domain are those who carve out a market for that work, commanding competitive prices with no benefit to the public. And indeed there are people who have contributed nothing to the creation or esteem of a literary, musical or audio-visual work and who through research stand ready to advantage only themselves by their knowledge that a work is about to enter the public domain.

There is no rationale for the renewal obligation -- its history has only produced sorrow for the unknowing without any concomitant public benefit. Is it not time, during the waning years when copyright must be renewed on pre-1978 works, to acknowledge the antiquity and anomaly of renewal by abandoning it once and for all?

We urge speedy enactment of H.R. 2372.

And one may ask: Who is the possible beneficiary of any work which, because of oversight, enters the public domain? Not the public! That is a time-honored gross misconception, as evidenced by all of those classic books, records and tapes, whose contents have long entered the public domain and which carry the same, and in some cases a greater, selling price then a fully-protected work. This committee has time and again heard from primary legal scholars who have lectured on the great common benefit derived by the public from works no longer protected by copyright. While this, like so many old wives' tales has a ring of plausibility, it is not susceptible of scrutiny when subject to the light of day. Consider the following:

(a) The oldest and most successful book is The Bible -- sold in expensive cloth and deluxe editions -- and clearly in the public domain. The retail price can range from hundreds of dollars to $2.00.

(b) "Phantom of the Opera," written in 1910, entered the public domain in the United States in 1985, and is still one of the hottest tickets in New York at a cost of over $50.00 per seat.

(c) All of the paintings of Van Gogh, Rembrandt, Renoir and VanDyke -- which, if available for sale, command millions of dollars.

Mr. SANGMEISTER. Mr. Candilora.

STATEMENT OF VINCENT CANDILORA, PRESIDENT AND CHIEF EXECUTIVE OFFICER, SESAC, INC., NASHVILLE, TN

Mr. CANDILORA. Good morning. My name is Vincent Candilora. I'm president and chief executive officer of SESAC, Inc. On behalf of SESAC, Inc., and the 2,500 writers and publishers that we represent, I wish to express our appreciation to Chairman Hughes and to the members of the subcommittee for the opportunity to present this statement in support of H.R. 2372.

SESAC was founded in 1930 by Paul Heinecke. Paul Heinecke's many accomplishments are detailed in the Congressional Record of January 14, 1965. In its early years, SESAC was known as the Society of European Stage Authors and Composers. That connotation was discontinued over 50 years ago as the SESAC repertoire became overwhelmingly Americanized.

SESAC became and is a well-known trade name in the music industry. SESAC continues to fulfill Mr. Heinecke's mission more than half a century later by finding, developing, and protecting the rights of creative talent out of the mainstream of contemporary music capitals. Today SESAC represents some 2,500 writers and publishers and 160,000 musical compositions.

Rather than to repeat the words of my colleagues, particularly the words of Mrs. Byrd, I feel that that really exemplifies exactly what the injustice is if the current law is not amended. Therefore, I would simply like to say that SESAC, on behalf of our writers and publishers, strongly supports H.R. 2372. Thank you for this opportunity.

Mr. SANGMEISTER. You're welcome.

[The prepared statement of Mr. Candilora follows:]

PREPARED STATEMENT OF VINCENT CANDILORA, PRESIDENT AND CHIEF EXECUTIVE OFFICER, SESAC, INC.

SESAC Inc. hereby expresses its appreciation to Representative William J. Hughes, Chairman, and to all the members of the Subcommittee on Intellectual Property and Judicial Administration of the Committee On The Judiciary of the United States House of Representatives for the opportunity to submit this statement in support of H.R. 2372 which would amend Title 17 of the U.S. Code.

I

SESAC BACKGROUND

SESAC was founded in 1930 by Paul Heinecke, a German immigrant and American citizen possessed with both a love of music and keen business acumen. In his twenties, Mr. Heinecke had been the American Manager of Breitkopf and Hartel, the largest European publisher of music in the world. A man of vision, he accomplished his goal of licensing European and American music domestically on the basis that music is the common denominator in attaining improved international understanding. He paved the way for American performances of "Sibelius' Finlandia" and "Valse Triste," "Ponce's Estrellita" and "Provost's Intermezzo" as well as the music of modern composers such as Arnold Schoenberg and Frederick Delius. He formed SESAC to represent the unrepresented composer and author. In its early years, SESAC was known as the Society of European Stage Authors and Composers - that connotation was discontinued over 50 years ago as the SESAC repertory became overwhelmingly

Americanized. SESAC became and is a well known trade name in the music industry. SESAC continues to fulfill Mr. Heinecke's mission more than a half-century later by finding, developing and protecting the rights of creative talent out of the mainstream of contemporary music capitals. Today SESAC represent some 2,500 writers and publishers and 160,000 musical compositions.

The many accomplishments of Paul Heinecke are detailed in the Congressional Record at January 14, 1965.

II

HR 2372 PREVENTS UNKNOWING AND UNJUST FORFEITURES OF COPYRIGHTS

H.R. 2372, introduced by Chairman Hughes and Congressman Moorhead, would amend the Copyright Act, Title 17, U.S. Code, to provide for automatic renewal of copyrights. The bill protects the expectancy interests of copyright renewal holders while preventing the inadvertent or unknowing forfeiture by unsophisticated or negligent copyright holders. Currently, the Copyright Act requires that authors, heirs or representatives comply with technical renewal registration requirements in order to obtain the additional 47 years of copyright protection granted in the Act. Under this provision, which is out of line with the laws of other nations, potential claimants must first determine who is entitled to claim the copyright and only then may the renewal term be claimed. Next, the claim must be filed within a certain time period regardless of illness, disability or other legitimate reasons that may prevent filing and result in copyright forfeiture.

In many cases the renewal claimant may be assumed to be a corporation or other business, but in many more cases the claimant may be a child, grandchild, surviving spouse or other heir to an author. While these potential claimants are often dependent upon the income generated by the copyrights, they are also often unaware of their responsibilities under the copyright law. This lack of knowledge is also prevalent among authors themselves. SESAC works with songwriters on a daily basis and its staffers are frequently confronted with both aspiring and successful songwriters who are woefully uneducated about copyright law. Their interests lie in creating their works rather than in looking after their business interests.

Songwriters generally assign their copyrights and renewal rights to music publishers who then have the duty to register the works for renewal. If those publishers are small businesses, many years later the owners or heirs may no longer be interested in the business or may not understand copyright formalities. Thus, while the songwriter must rely on his publisher to take care of registration and other business matters, the publisher may fail to do so resulting in the forfeiture of not just the publisher's rights but also the writer's. These lapses have occurred even at major corporations and such valuable works as the films "It's A Wonderful Life," "Meet John Doe" and songs such as the SESAC-represented Bill Haley & The Comets hit "Rock The Joint" by Crafton and Keen have fallen into the public domain.

An additional fourteen years remains before the last renewal copyright registration is due. As time goes by and as fewer and fewer copyrights remain to be renewed it is likely that the instances of inadvertent failure to renew will increase.

The proposed legislation, "The Copyright Renewal Act of 1991", would eliminate these injustices by providing for renewal of copyright without the technical registration requirements. No longer would it be necessary to determine exactly who is the appropriate renewal claimant and when registration must be made, nor would it be necessary to file the renewal claim.

III

H.R. 2372 PROVIDES INCENTIVES FOR REGISTRATION, BUT DOES NOT ADVERSELY AFFECT RENEWAL CLAIMANTS RIGHTS

Under the legislation, although renewal would be automatic, certain benefits would accrue to those who do register renewals. First, renewal registration would continue the presumption of *prima facie* copyright validity. Second, if the underlying work is not registered for renewal, derivative works could continue to be used without authorization from the copyright owner of the underlying works.

The Act will not adversely affect the renewal interests of publishers, heirs or others who have an interest in the renewal term. Since the term of copyright will still be divided into two periods, authors, publishers, heirs and others can still bargain for renewal rights and existing contracts granting renewal rights will not be affected.

Finally, H.R. 2372 will not retroactively grant protection to works that have already fallen into the public domain because of failure to register for renewal.

IV

CONCLUSION

Aside from the benefits to the individual creators of copyrighted works and their heirs and assigns, the Act benefits the United States generally. The Act will bring the U.S. copyright law closer to the Berne Convention vision of eliminating formalities. It may help U.S. trade negotiators and even provide greater or longer protection for U.S. works abroad since it eliminates a technical requirement which adversely affects many foreign publishers and copyright owners.

SESAC, Inc. supports H.R. 2372 and urges the Subcommittee to recommend its enactment into law.

Mr. SANGMEISTER. Mr. Karp.

STATEMENT OF IRWIN KARP, COUNSEL, COMMITTEE FOR LITERARY PROPERTY STUDIES, RYE BROOK, NY

Mr. KARP. I want to thank the subcommittee for giving us this opportunity to speak to the bill.

I might start by pointing out that the members of our group, an informal group which prepared the initial draft of this legislation, were in large part very intimately involved in the 1976 revision of the Copyright Act. Barbara Ringer, former Register of Copyrights, was one of the principal draftsmen of the current law. Father Drinan was very much involved in the revision process as a member of your subcommittee. John Hersey and Dean Robert Wedgeworth testified frequently before your subcommittee, Mr. Hersey as president of the Authors League and Dean Wedgeworth as the then-executive director of the American Library Association. Both of them served for several years as members of CONTU, a committee established by the subcommittee and your counterpart in the Senate to study the new technological uses of copyright.

I was involved as attorney for the Authors League, and other members of the group, such as Harriet Pilpel, who recently passed away, and Professor Kernochan, have been experts in copyright law for many years, Professor Kernochan teaches it at Columbia Law School.

All of us felt that there was a way to deal with the only reason why the Congress had decided in 1976 to retain the two-term renewal system for works created before 1978. At that point, as the chairman pointed out, and as Mr. Moorhead pointed out in his statement, Congress had concluded that the renewal system was not workable: It was highly technical, and many forfeitures of copyright are due to its technicalities, and it caused an unjust and inadvertent loss of copyright for many authors and their families.

The only reason Congress retained the two-term system for existing copyrights was because it was concerned that by establishing a long single term, contractual rights in prospective renewal copyrights might be impaired. In other words, someone who had bargained with the widow and children of an author to acquire the rights, should they succeed to the renewal copyright because of the author's prior death, might be divested of that contractual right if Congress simply added 47 years to the first term of copyright, creating a single term of 75 years without the requirement of renewal. It was solely for that reason that Congress decided to retain the two-term system for these pre-1978 works.

The solution that we proposed, which is embodied in the bill, is to retain the renewal system with all of its consequences and without changing it, but avoid forfeitures of copyright by making renewal automatic if the author or other renewal claimant didn't choose to register or forgot to register, which is more often the case, during the final year of the first term.

Having said that, I might also point out another reason why the renewal system was antiquated, in addition to being contrary to the basic philosophy embodied in the 1976 act that authors should be guaranteed copyright protection for a given term, rather than risk losing it midway, or now even less than midway, through the full term. That reason that the main purpose of the renewal clause had largely been frustrated by a decision of the Supreme Court. The renewal clause, according to the 1909 House report, was retained not to create a trap through which works would prematurely fall into the public domain, but to protect authors against the compulsion to assign their copyrights in perpetuity and thus to lose benefits that might accrue from a work whose value couldn't be determined at the time the contract was made, at the very beginning of the term; and to assure that they would be able to benefit if the work later became valuable, as is so often the case.

That's why Congress in 1909 said it would keep the two-term system, intending that at the end of the first term the renewal would vest as a new property unencumbered by any grant that the author had made during the first term. From the author's point of view, that was a worthy provision. I don't think it anticipated the huge losses of copyright that resulted, but it was frustrated by the decision in *Fisher* v. *Witmark*, which said that if the author lived to the renewal year, he was bound by the earlier grant of the renewal assignment, and the only way he could escape it was to die before the renewal year.

As a result, many authors were deprived of that benefit, so that the clause became less of a bargain for authors, especially when balanced against the huge loss of copyright through inadvertence, technicalities, and so forth. There are many reasons why authors and others lose copyright through the renewal clause. I will not go into detail. I might mention one: Simply not knowing about the clause or forgetting about it—and forgetfulness is a phenomenon that afflicts not only individual authors, but even large companies like motion picture companies. One of the more heavily documented areas of copyright forfeiture involves motion pictures. That was not our major concern. Our group was primarily concerned with the individual author, composer, poet, and so forth, and their heirs.

But, in addition to forgetfulness, the clause creates very difficult technical requirements that are not easy even for attorneys to comprehend. The most litigated provisions of the Copyright Act over the last 70 or 80 years have been both renewal and initial registration, and notice of copyright. Each of these formalities has cost authors copyright protection. Because of that risk, the Berne Convention provides that copyright would be enjoyed without any formalities—no registration, no renewal, no copyright notice.

Our law, beginning in 1976, has moved in that direction, moved very rapidly and with broad strides. In the 1976 act Congress provided that registration was no longer mandatory. Indeed, it wasn't mandatory under the prior 1909 act. The only time that an author could be compelled to register an original copyright, a copyright in the original term, was if the Register made a demand on the author for the deposit of two copies of the work, a demand that was seldom made.

Under the present law, registration was not required as a condition of copyright protection, as section 408 actually specified. The only time that registration had to be made was if the author erroneously omitted a copyright notice or made an error in the notice.

Even that requirement was eliminated by the Berne Implementing Act of 1988.

So, we have now reached the point under our law where authors of works created after 1978 are assured the full term of copyright without any possibility that they would fall victim to any of these formalities. The present bill actually closes the one last loophole through which copyrights do slip quite regularly into the public domain, the requirement of mandatory renewal of copyrights in pre-1978 works.

Congress actually addressed the public policy questions that the chairman alluded to in his opening statement. It saw no conflict with the public interest in substituting a long single term for a renewal system. There had been witnesses testifying during the 1970's revision process in favor of retaining the renewal system in order to provide a means of forfeiting copyright protection and "enriching" the public domain. Your committee's 1976 report rejected that argument and said that the benefits of a long single term, both to authors and the public, outweighed whatever benefit might come from losing works to the public domain prematurely.

Similarly, Congress saw no conflict with the public interest or the constitutional purpose of copyright when in 1976 it increased the renewal term of all pre-1978 works by 19 years. This was an automatic extension. One didn't apply for it. Congress gave it automatically to all works still in their original or renewal term of copyright.

That extension has kept hundreds of thousands of copyright works out of the public domain for two decades beyond the point when the protection would have expired under the old 58-year, two-term system. There is no evidence, and no one has really come forward to say, that the public has suffered because of that.

As Mr. Weiss pointed out and as your committee's report pointed out in 1976, ordinarily the public pays as much for a work in the public domain when it buys a copy of a book or a recording of a song as it does for a copyrighted work, and that throwing works into the public domain very often simply enriches the proprietor of the publishing enterprise or the record company at the expense of the author, because he doesn't pay those few cents in royalties that the author would otherwise get.

Indeed, Congress, even before 1976, had in a series of bills extended existing copyrights simply to keep them alive so they could enjoy the benefits of the present law. I think that the purpose of the bill satisfies and complies with that decision, basic decision, made by the Congress in 1976, and it simply assures authors that they will enjoy the full term of protection for the renewal period, which Congress provided for them in the 1976 act.

I thank you very much for this opportunity to testify.

Mr. HUGHES [presiding]. Thank you very much, Mr. Karp.

[The prepared statement of Mr. Karp follows:]

STATEMENT OF IRWIN KARP, ON BEHALF OF
THE COMMITTEE FOR LITERARY PROPERTY STUDIES
On H.R. 2372 (Title II)

BEFORE THE SUBCOMMITTEE ON INTELLECTUAL
PROPERTY AND JUDICIAL ADMINISTRATION
HOUSE COMMITTEE ON THE JUDICIARY
June 20, 1991

Mr. Chairman, my name is Irwin Karp, and I appear on behalf of the Committee for Literary Property Studies ("CLPS"). I appreciate this opportunity to testify in support of the copyright renewal provisions of H.R. 2372 (Title II). CLPS is an informal group of authors, academicians, literary agents and attorneys concerned with the protection of authors' rights. [Georges Borchardt, Robert F. Drinan, Frank D. Gilroy, Henry F. Graff, John Hersey, Justin Kaplan, Irwin Karp, John M. Kernochan, Perry H. Knowlton, Barbara Ringer, and Robert Wedgeworth.]

H.R. 2372 would amend Section 304(a) of the Copyright Act to provide for the automatic renewal of copyrights secured from 1963 to 1977, and to make registration of renewal applications voluntary rather than mandatory. In November, 1989, our group proposed this revision in a memorandum and draft bill we submitted to then Chairman Kastenmeier, Chairman DeConcini, and the Register of Copyrights.

The Purpose and Effect of Automatic Renewal

The purpose of the amendment is to protect authors and their families against forfeiture of copyrights upon failure to comply with the mandatory renewal requirements of Section 304(a). Prevention of such forfeitures was one of the reasons that Congress, in the 1976 Copyright Revision Act, established a single life-plus 50 year copyright term in place of the two-term renewal system which governed the duration of pre-1978 copyrights. The Judiciary Committee noted that the renewal system was burdensome, unclear and highly technical -- and "[i]n a number of cases it is the cause of inadvertent and unjust loss of copyright." [H.R. Rep. 94-1476, 94th Cong. 2d. Sess. 134 (1976)]

Congress, however, retained the mandatory renewal requirement for pre-1978 copyrights still in their first term on January 1, 1978 -- rather than extend the term to 75 years. As the House Report explained, this was done solely to avoid impairing contingent rights (in future renewal copyrights) acquired under existing contracts with authors and other possible renewal claimants. [p. 139]

The provisions of H.R. 2372 would prevent forfeitures of copyrights secured between 1963 and 1977, without impairing any those contingent rights. If no application for renewal is filed within one year before the original term expired, the renewal term would automatically vest (on its first day) in the statutory claimant entitled to it on the last day of the first term. Automatic renewal would have the same consequences that manda-

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tory renewal has under the present law.

Automatic renewal thus eliminates the sole concern which prompted Congress to retain the mandatory renewal requirement for copyrights still in their first term on January 1, 1978. Authors and their families would be protected against "inadvertent and unjust losses of" copyrights secured between 1963 and 1977. But no other substantive changes would be made in Section 304(a). Automatic renewal would vest the second term of copyright in the same persons entitled to secure it under the present section. And the Bill provides that automatic renewal of a copyright would have the same effect on prior grants of renewal-term rights as did mandatory renewal under the present section. Consequently, contingent rights under these prior grants would not be impaired, and the Supreme Court's interpretation of the renewal section in the REAR WINDOW case (Stewart v. Abend, 14 USPQ 2d 1614 (1990)) is not affected.

The amended renewal section provides for voluntary renewal registration, and establishes incentives for registration. These and other provisions, and their consequences, have been described and analyzed in the clear and thorough statement submitted by the Register of Copyrights when he testified before the Subcommittee on June 6th.

Copyright Forfeiture Under the Renewal System

These are some of the reasons why the present mandatory renewal requirement causes "inadvertent and unjust loss of copyright."

... Many American authors are unaware of the renewal requirement; and all the more so in the early years of their careers. Eugene O'Neill, for example, forfeited the copyrights in several of his earlier plays by failing to file renewal applications.

... Widows, widowers and children of deceased authors, ignorant of the renewal clause, fail to exercise their renewal rights.

... Foreign authors often lose U.S. copyrights since they are even less familiar with the renewal system; their copyright laws do not require copyright renewal.

... Authors, particularly those who create dozens or hundreds of works, inadvertently fail to renew or submit applications after the renewal period has expired. It requires careful record-keeping and monitoring to file a timely renewal registration 28 years after each copyright was secured. Many authors do not keep such records. When authors die before the renewal year, their surviving spouses and children, or other successor claimants, are at an even greater disadvantage.

... Authors often rely on literary agents or publishers to renew copyrights, and they can make the same mistakes. When authors change agents or publishers, or when publishers are acquired by larger firms, or go out of business, renewal applications may be overlooked.

The "unclear and highly technical requirements" of the renewal clause also cause forfeitures of copyright.

... Failure to designate the proper renewal claimant in the application, filing of the form by an unauthorized person, and other errors may invalidate renewal applications.

... Novels, poetry, and other works first published in periodicals and later in book form are thrown into the public domain when the author only files a renewal application covering the later publication, and fails to file one for the copyright secured by the initial publication.

... Similarly, authors have forfeited copyrights in plays and other works initially registered in unpublished form and subsequently published — by only filing a renewal application covering the later publication, and not filing a timely application covering the earlier unpublished registration.

... Confusion as to the renewal period leads authors and other claimants to file applications too late to be effective.

Automatic Renewal and The Public Interest

Automatic renewal of pre-1978 copyrights would not violate the public policy underlying the Copyright Act. It has been argued that the mandatory renewal requirement serves the public interest because it does throw works into the public domain after only 28 years, and makes them available to the public.

Congress rejected that argument in writing the 1976 Act. It was urged to retain the renewal system for works copyrighted under the new Act, so that books, plays, musical compositions, etc. would continue to fall into the public domain after only 28 years through failure to file renewal applications. But Congress chose to replace the renewal system with a long, single copyright term, among other reasons, to prevent such forfeitures and to ensure that authors and their heirs would retain post-1977 copyrights for the full term of protection. (H.R. Rept. 94-1476, 136)

It should be observed that other countries have not found it in their public interest to prematurely terminate copyrights through a renewal requirement. Under their laws, copyrights endure for a long, single term; works only fall into the public domain when that entire period of protection expires.

The House Report (p. 136) also noted that precluding inadvertent copyright forfeitures caused by the renewal clause would not prevent "using any work as source material" — i.e. employing the facts, information, and ideas it contains; or from making fair use of it. And the Report pointed out that these forfeitures do not necessarily benefit the public:

> "The public frequently pays the same for works in the public domain as it does for copyrighted works,

> and the only result is a commercial windfall to certain users at the author's expense. In some instances, the lack of copyright protection actually restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights." (p. 134)

Similarly, Congress apparently saw no conflict with the public's interest or the Constitutional purpose of copyright, when -- in the 1976 Act -- it increased the renewal term of all pre-1978 copyrights from 28 to 47 years. This automatic extension keeps hundreds of thousands of copyrighted works out of the public domain for almost two decades beyond the point their protection otherwise would have expired.

The 19-year extension was not granted as an incentive to create new works; the books, plays, music and other works protected by it had already been created and copyrighted. The purpose was to assure their authors, and their families, a reasonable -- 75 year -- period of copyright protection, comparable to the life-and-fifty year term established for works created after the 1976 Act took effect.

The purpose of H.R. 2372 is to assure authors of works copyrighted between 1963 and 1977, and their families, of protection during the last 47 years of that period, by eliminating the mandatory renewal requirement which frequently has caused the "inadvertent and unjust loss" of copyright when the first term expires.

As Register of Copyrights Ralph Oman advised the Subcommittee, The Copyright Office finds H.R. 2372's revision of the renewal clause "to be meritorious and in the public interest." (Mr. Oman's statement, p.31). We heartily agree, and we urge that the Bill be approved by the Subcommittee, and enacted by the Congress.

Mr. **HUGHES**. Mr. Karp, maybe you are the best one to help me with this. My predecessor, Bob Kastenmeier, believed that our constitutional authority for automatic renewal authority was questionable because he, I believe, found no authority in article I, section 8, of the Constitution. Congress cannot promote the progress of science and the useful arts, he believed, in works that have already been created. What's your view on our constitutional authority?

Mr. **KARP**. Well, pragmatically, he provided the answer. In 1976, he and the subcommittee, and then the Congress, automatically extended the term of existing renewal copyrights by 19 years. That wasn't because it was an incentive to create the works; they already existed. It automatically added 19 years to the term of protection.

Indeed, in earlier copyright acts Congress has extended the term of existing copyrights as it enlarged the period of protection. It did that in the 1909 act.

There's nothing in the Constitution or in the broad language of its copyright clause which says Congress can't add to the term of a copyright. As I say, Congress did exactly that in 1976, and no one has challenged the constitutionality of the present Copyright Act for that reason.

Mr. **HUGHES**. Mr. Gould, I wonder if you could possibly give us a precise definition of the problem that is addressed by title II of H.R. 2372 relating to automatic renewal. What I'm trying to find out is, what is it that you believe that we are accomplishing by extending for this period? Is it basic due process, justice, equity?

Mr. **GOULD**. I think it's an equity. I think it's an equitable concept, but—I'm sorry, did I interrupt? I didn't mean to.

Mr. **HUGHES**. No, no, go ahead.

Mr. **GOULD**. That pursues further the whole idea of copyright protection, as Mr. Karp and others have said here. In the 1976 revisions, this was, for many reasons, not considered.

I think what is at stake is very simple. It is almost impossible for any writer, any creator, over a period of time to track the renewal of his works. It's possible perhaps if one writes just a few numbers and you can devote the rest of your life to looking after them, but otherwise it doesn't happen that way.

So, I think what we are addressing is the inequity of somebody losing his or her creative work, so that it goes into the public domain because of a slipup. What we're trying to do is to rectify the procedures to make them easier to deal with.

I mentioned before that some of us, let's say, have the good fortune to be able to have, let's say, publishers that were protective of this, or lawyers, or whoever one might have. But, in many cases, in most cases, there isn't that protection. Even in the area of being protected, it can slip up. I had a personal experience of this happening where I assumed that something was being taken care of that wasn't. But, I don't want to take up time. I will be happy to answer whatever I might know.

Mr. **HUGHES**. Just for the purposes of argument, let's work on the assumption that we are attempting to accord basic justice and equity to this one group. What is the rationale for extending the term, however, of a copyright to an author who hasn't taken the steps to register? We're talking about the vast majority of them.

The Copyright Office provided some data for us that suggested that very few individuals actually register their copyright. I'm looking at a cross section of various categories—books, periodicals, lectures, drama, music, and so forth. Music has the highest percentage of original registrations and renewals. But, even there, the vast majority apparently do not register, do not renew.

Mr. GOULD. May I respectfully suggest that I don't see why some people who, for some reason or another, do not address the problem properly should penalize the whole idea. I mean, this is like saying we have traffic lights, but there are people who walk against the lights.

Let me just try, without getting too complicated. In my own case, as an example, there are a few things that happened that had to do with works that had gone through transfers in terms of publishers, from one publisher to another. As we know, we live in an age where one publisher is absorbed by another corporate group, et cetera, et cetera, et cetera.

In that process, at a certain point the work can end up at a certain period of time with a publisher who, for one reason or another, is not aware that this work has to be renewed. There would be no way of my knowing this. As I said before, in my case I have written hundreds and hundreds of works.

I feel that the fact that people have not gone through the necessary procedures does not justify penalizing those who have lost it because the machinery is not right for keeping it where it should be.

Mr. HUGHES. Let me just say that I understand that. I understand the concerns expressed by Mrs. Jacqueline Byrd and the failure on the part of the owner of that particular copyright to renew. We can fix that, it seems to me, without extending the term of those that didn't even bother to register.

Part of the basic unfairness, I think, the flip side of the coin is, suppose somebody had done quite a bit of research to see whether or not a particular work—basically because they want to use it—had become licensed. They determine that it appears to be in the public domain because it is not registered. How would they ever find out? If it's never been registered and we extend the term, and they in good faith after exhaustive research use it, then are exposed to litigation because they've used somebody's unpublished work, isn't that basically unfair? Anybody on the panel can respond to that.

See, I have no problem whatsoever with extending the term of those who have taken the time and the trouble to register. You can do basic equity to take care of situations like the Byrd works. But, you have a whole universe of people out there—in the instance of photographs, it's as much as 95 percent—who have never taken the time to register their works. Why would we want to renew those? What's the compelling public policy reason to renew for them? That's the basic question. Yes?

Mr. KARP. Mr. Chairman——

Mr. HUGHES. Yes, Mr. Karp.

Mr. KARP. I take it that the question you are putting involves the failure to register a copyright during the first term——

Mr. HUGHES. That's correct.

Mr. KARP [continuing]. And whether that failure should preclude automatic renewal?

Mr. HUGHES. That's correct.

Mr. KARP. I assume, complementary to that is the premise that if someone did register in the first term, you would have no problem with extending renewal automatically?

Mr. HUGHES. Yes, I can see the basic equities there, but the problem that I am wrestling with is, why should we provide an extension of term for somebody who has never basically expressed an interest in the first place?

Mr. KARP. May I address that?

Mr. HUGHES. Yes.

Mr. KARP. First of all, if you take a real universe, which is the whole copyright world, not just the United States, every other copyright country except the Philippines—and I don't know if they've stopped using our renewal clause; I haven't kept up with the Philippines——

Mr. HUGHES. I assume they have not.

Mr. KARP. But, every other country operates under a copyright system where copyright continues for the author's life and then 50 years after his death, which is about the same as 75 years under our renewal system, without any registration, without renewal, without notice. There is no requirement for any of these in those copyright laws. French and German and British publishers, some of whom are astute enough to have acquired American publishers, have been able to function without any difficulty. Performing arts societies and music publishers in all of these countries have had no problem with that absence of formalities.

But, let me come back to the United States and try to see where the problem arises. The problem, I don't think, would arise with unpublished works created before 1978 for a very simple reason. First of all, there were certain categories of works that could be copyrighted before publication. Under the old law, for books and other types of material the only way of securing a copyright was to publish with notice. Registration didn't give you copyright; publication with notice did.

However, certain categories of works, like music and photographs and others, could be copyrighted by registering the unpublished work. If the unpublished work were copyrighted that way, you'd have a registration.

Second, if the work remained unpublished through December 31, 1977, then it automatically secured copyright under the present law for a long single term. So, in effect, unpublished works are not part of the problem.

I should point out, as to both the 1909 act and the 1976 act, there isn't a word in either of them that says you must register during the first term in order to secure a renewal of copyright. The requirement really comes through a Copyright Office regulation which provides that the Office will not accept a renewal application unless an original registration has been filed. Very often, people at the last minute, the very end of the first term, register copyrights because they can't file a renewal without that registration.

Now one of the reasons that people do not register copyrights, and didn't register under the old law, is the same reason they don't renew: They didn't know that the registration requirement existed or that it was mandatory, which it really wasn't.

Also, when you get to multiple works, such as comic strips, large numbers of poems that a poet will write during his lifetime, it became, even at a low registration fee, rather costly; a lot of important works were never registered, major comic strips, and so forth.

I understand many of the meritorious radio dramas of the forties and fifties were never registered or renewed through inadvertence. Amos and Andy, the subject of a recent copyright infringement suit, was thrown into the public domain not because Amos and Andy forgot to renew, but CBS forgot to renew. They lost a very valuable property.

When you get down to works copyrighted by publication prior to 1978; if there's a notice with a date in it, then the prospective user can carry on his research because he knows that if the work was published between 1963 and 1977, he would have to get permission, just as he would have to do for any work created after 1978. If there were no notice, it's a pretty safe assumption, with some risk but not great, that the work is in the public domain. If you published a work before 1978 without a copyright notice, that forfeited the copyright.

So you really have the problem, I think, in the area where the notice says copyright, or "C" in the circle, and the name of the proprietor, but doesn't contain a date. That was permissible for various categories of works like photographs, technical drawings, and the like.

But, even there, the problem is no different than it would be under the new law where you find that notice. Also, because you can't tell whether the work was registered, because many photographs and other graphic works were copyrighted not individually but as part of a magazine, compilation, or a book, and the registrations for those works, if you could track back to them, wouldn't even mention or identify the particular photograph. Very often photographs are distributed with the dateless copyright notice long after they were copyrighted in that way.

So the problems are not unique to automatic renewal.

Mr. HUGHES. I understand.

Mr. KARP. I don't think this is the sine qua non of this bill by any means, but these are some of the considerations.

Mr. HUGHES. I appreciate that. That's a good analysis.

We have a vote in progress. Would the gentleman from California like to begin?

Mr. MOORHEAD. I'm going to yield to Mr. James, please.

Mr. HUGHES. Mr. James, the gentleman from Florida.

Mr. JAMES. Do you intend on returning?

Mr. HUGHES. Yes. Would you rather come back? Why don't we break here and we'll be back. We have a vote in progress. We'll come back in 10 minutes. The subcommittee stands in recess.

[Recess.]

Mr. HUGHES. The subcommittee will come to order.

I want to apologize for the lengthy delay, but, unfortunately, we had a series of parliamentary disputes. We were talking about South Africa, and it generates more heat than light at times. But, we apologize for holding you so long.

We're going to have to vote very shortly again, so we're going to see if we can move through real fast. I would ask you to try to keep your answers brief, and we'll try to keep our questions brief.

The gentleman from Florida.

Mr. **JAMES**. Yes, I have one question. We have a 5-minute vote, so you'll see us head out of here really quickly when they ring the bell because it will take that to get there.

My one question is: Mr. Karp, is the law settled that Congress cannot revive lapsed copyrights? It appears to me that it's not that settled, but I wanted your opinion on it.

Mr. **KARP**. I think that there's substantial support in the *Graham* v. *John Deere* decision of the Supreme Court, which happens to involve a patent but deals with the same constitutional clause, that the Congress couldn't restore a public domain work to protection. Of course, that's not what this bill proposes.

Mr. **JAMES**. I understand that, and I understand that some of the discussions earlier related to the problem in 1976; it's already been passed. As far as people not caring or caring, I, for one—in the practice of law for 20 years, the one thing that would send a chill up my spine was the statute of limitations. That's what gave you more sleepless nights, wondering if you had done something in a timely manner.

So, I see the problem. This is especially a terrible problem because you're depending upon waiting until a specific point in time. You can't do it in advance. It's a tortuous process. As long as you've extended it for others, I don't see any reason that you wouldn't here. If it was a mistake to extend it in the first place, that's one thing, but you're not saying that. You're saying, hey, treat these people the same way; it's too much of a burden, too much—it couldn't be the intention, sort of like the child's game of "May I take a giant step?" It's ridiculous to me to have that problem. I see how it occurred, but I think you've come up with a solution to correct it. I congratulate you.

Thank you so much.

Mr. **KARP**. Thank you.

Mr. **HUGHES**. I wonder if, for the record, we can find out—for instance, from ASCAP—how many members did not register their copyrights in years 1963 through 1977. Is that something you could provide for the record?

Mr. **GOULD**. I'll have to ask—Bernie, is that possible? I certainly wouldn't know. I wouldn't know offhand.

Mr. **KORMAN**. There's no way to know, Mr. Chairman. A work is automatically in the ASCAP repertoire the moment it is created.

Mr. **HUGHES**. I see.

Mr. **KORMAN**. But very often an author will put one in his desk drawer and we won't even know about it. There's no way of knowing how many are created and not registered.

Mr. **HUGHES**. Ms. Preston, how about BMI? Is that possible? Is that information available?

Ms. **PRESTON**. No, there's no way of knowing.

Mr. **HUGHES**. I presume the same thing is with SESAC, Mr. Candilora?

Mr. **CANDILORA**. Yes, sir.

Mr. HUGHES. We have a number of other questions that we're going to submit to you in writing. I'm not going to hold you any longer because we're in between votes. Craig James and I move pretty fast, but sometimes we can't make it to the floor in 4 minutes to catch that next vote, and they don't wait for you on the 5-minute votes. So, we're going to address the questions to you in writing, if that's OK. The record will remain open for 10 days, so that we can receive your responses.

[No further questions submitted to witnesses.]

Mr. HUGHES. Thank you very much. Some of you have come long distances to be with us, and we appreciate it very much. You have been very helpful to us, and we thank you.

I apologize for the delay, it looked like an Abbott and Costello routine on the floor; you know: Who's on first? What's on second? That's what it looked like to me when I arrived on the floor a little while ago.

[Laughter.]

Mr. HUGHES. Anyway, thank you. That concludes the hearing today. The subcommittee stands adjourned.

[Whereupon, at 12:29 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—LETTER FROM MARK C. MORRIL, ESQ., SENIOR VICE PRESIDENT AND GENERAL COUNSEL, SIMON & SCHUSTER, TO HON. WILLIAM J. HUGHES, CHAIRMAN, SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION, JUNE 24, 1991

SIMON SCHUSTER

Mark C. Morril
Senior Vice President
General Counsel

June 24, 1991

The Honorable William J. Hughes
Chairman, Subcommittee on Intellectual
Property and Judicial Administration
207 Cannon House Office Building
Washington, D.C. 20515

Re: Title I of H.R. 2372

Dear Mr. Chairman:

I write to supplement my oral testimony of May 30, 1991 in support of the above-referenced legislation. I respectfully request that this letter be inserted into the Record as part of that testimony.

While many issues have been raised during the hearings and in supplemental submissions of the various interested parties, the pertinent considerations, I submit, remain the following:

1. There is an urgent need for the narrowly focussed corrective legislation now under consideration. As I have emphasized in both my formal statement and my oral testimony, those of us responsible for decision-making within this nation's publishing houses are in agreement that the recent decisions of the Second Circuit have created a virtual per se rule barring as a practical matter any quotation without permission of unpublished works. The resulting censorship already has diminished the ability of biographers and historians to accomplish their work and will continue to do so until legislative relief is forthcoming.

2. There is no reasonable prospect of judicial relief from this court-made rule. The only pertinent case now before the Second Circuit is one in which the facts are so narrow and the decision below so fact-specific that even an affirmance is highly unlikely to produce the needed change. As Chief

Judge Oakes of the Second Circuit has testified, it simply is not realistic to believe that this court will disavow in the near term its own recent decisions in the Salinger and New Era cases.

3. The proposed legislation is narrowly targeted to disavow the new per se rule and to restore the law to a state consistent with the Supreme Court's analysis in Harper & Row v. The Nation.

As to the privacy concern raised by Representative Frank, I agree in substance with the views of Messrs Abrams and Vittor. However, it bears further emphasis in my view that Congress need not and should not resolve, in the context of its consideration of the current proposed legislation, the scholarly debate as to whether the fair use factors of Section 107 of the Copyright Act are intended to be exclusive, as urged by Judge Leval and Mr. Abrams, or, rather, as urged by Professor Ginsburg, the Copyright Law permits -- or even requires -- consideration of additional equitable factors, including issues of privacy and editorial integrity. This debate, however interesting as a matter of academic analysis or even practical application, should not, in my view, be permitted to obscure the urgent need for legislation to correct the per se rule established by the Second Circuit.

The current legislation would remedy specific judicial decisions which were grounded **not** on a privacy analysis, but, rather, on the erroneous view that under the second fair use factor the unpublished nature of the quoted work is in and of itself determinative of the entire fair use analysis. I agree with Messrs. Vittor and Abrams that the Copyright Law, with its emphasis on the expansion of knowledge and the protection of **expression** for a term exceeding the life of the author, is not an appropriate vehicle to protect **facts** from disclosure. However, it also bears recognition that the Fair Use analysis has proven over the years to be an appropriately elastic equitable doctrine which, when properly applied, has permitted the courts to take into account all of the factors reasonably pertinent to the required finding. On their face, several of the statutory factors have within them room to consider such matters as the manner in which the quoted work was obtained (e.g., was it deposited in a library or purloined), its nature (e.g., is it a diary of personal matters obviously not intended to be shared or of other than prurient value or a historical record of potential scholarly value) and other factors.

Most significantly, I respectfully submit that while the Congress has been shown an urgent need to remedy the problem now faced by historians and biographers, there has been no showing whatsoever of a need to create additional privacy protection. Unless and until Congress has before it facts to support a legislative finding that current state law remedies to protect privacy are inadequate or that the Copyright Law has in some way become a vehicle for abuse, this issue should not be permitted to divert attention from the current legislation which will be effective to remedy a proven, urgent problem.

Finally, I agree with and endorse the supplemental submissions of Messrs. Vittor and Abrams on retroactivity considerations and the issue of whether the proposed legislation is consistent with the United States' obligations under the Berne Convention. I urge the immediate enactment of Title I of HR 2372.

Respectfully,

Mark C. Morril

cc: The Honorable Carlos J. Moorehead
Other members of the Subcommittee

APPENDIX 2.—LETTER FROM KENNETH M. VITTOR, VICE PRESIDENT AND GENERAL COUNSEL, MCGRAW-HILL, INC., TO HON. WILLIAM J. HUGHES, JUNE 12, 1991

McGraw-Hill, Inc.

1221 Avenue of the Americas
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Telephone [illegible]
FAX 212/512-4827

Kenneth M. Vittor
Vice President and Associate General Counsel

June 12, 1991

BY HAND

The Honorable William J. Hughes
Chairman
Subcommittee on Intellectual Property
and Judicial Administration
207 Cannon House Office Building
Washington, D.C. 20515

Re: Title I of H.R. 2372 - May 30, 1991 Hearing

Dear Mr. Chairman:

I write on behalf of the Magazine Publishers of America ("MPA") to supplement my oral testimony on May 30, 1991 with respect to Title I of H.R. 2372.

1. Retroactivity

A question was raised by Representative Moorhead during the May 30, 1991 Hearing concerning whether H.R. 2372's proposed amendment to the "fair use" provisions of the Copyright Act should be made retroactive. I and other members of our panel responded during the May 30, 1991 Hearing that Title I of H.R. 2372 would not constitute an unlawful taking if it were applied retroactively because the proposed legislation was simply a clarification of existing law necessitated by the erroneous--and wooden--interpretation given by the Second Circuit to the Supreme Court's Harper & Row Publishers, Inc. v. Nation Enterprises decision. As such, H.R. 2372 would not change the law of "fair use" respecting unpublished materials but rather would bring it back to where it was--and should have been interpreted to be--immediately following the Supreme Court's Harper & Row v. Nation decision.

Our panel also observed that the proposed legislation would be rendered totally ineffective, and would not solve the serious editorial problems it is designed to address, if Title I were not made retroactive. All of the unpublished materials which are presently unavailable for selective quotation by biographers, historians and journalists by reason of the Second Circuit's decisions in the Salinger v. Random House, Inc. and New Era Publications Int'l. v. Henry Holt & Co. cases would continue to be "off-limits" if Title I of H.R. 2372 were given only prospective application.

Moreover, such a limitation on the application of your proposed "fair use" legislation would create insurmountable practical obstacles for publishers, authors and journalists. If the Bill were not applied retroactively, publishers, authors and journalists would be forced to determine the date each unpublished work to be quoted in a work was created in order to determine whether H.R. 2372's "fair use" provisions applied. The result: publishers would continue to engage in self-censorship and decline to make "fair use" of any unpublished materials.

For all of the foregoing reasons, MPA believes Title I of H.R. 2372 should be applied retroactively and submits that there are no constitutional, statutory or other problems with such an application of the proposed "fair use" amendment.

2. Privacy

There was extensive discussion during the May 30, 1991 Hearing regarding the issue of privacy. I submitted testimony last July on behalf of MPA regarding the privacy issue in connection with the Joint Hearing before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary and this Committee. (See Joint Hearing at pp. 252-54.) For your convenience, I reproduce below the relevant portions of MPA's testimony regarding the privacy issue:

> "1. Privacy
>
> "One of the concerns cited with respect to use of unpublished materials under the fair use provisions of the Copyright Act relates to the privacy rights of the copyright owner. In contrast to our antecedent common law jurisdiction, the United Kingdom -- which, to this day, does not recognize the right of privacy -- privacy is a fundamental right of all Americans. Both the

United States Constitution* and our common law of torts** protect privacy rights. Additionally, the collection and use of personally identifiable information in government and private sector databases are regulated by statutes such as the Federal Privacy Act*** and the Fair Credit Reporting Act.****

"In light of these significant and developing sources of privacy law, MPA believes that the Copyright Act is an unnecessary vehicle for the further protection of privacy rights. Indeed, we believe that the Copyright Act, which is expressly designed to encourage the broadest possible public dissemination of information, is plainly ill-suited to protect privacy rights. For example, the Copyright Act provides no protection against the dissemination of facts -- regardless of how intrusive or offensive such facts might be -- because only the literal form of expression is protected by copyright.

"Moreover, the Copyright Act's expansive protection of copyright for 50 years after the death of the copyright owner is in direct conflict with the general rule under privacy law that privacy rights terminate at death. The Second Circuit's application of the Copyright Act's 50-year rule to protect the privacy interests of decedents represents a dramatic -- and we believe unwise -- expansion of current privacy law. This problem -- which has been referred to as the 'widow censor' problem -- underscores the dangers inherent in utilizing the Copyright Act to protect privacy rights."

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* See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923), Griswold v. Connecticut, 381 U.S. 479 (1965), and Katz v. United States, 389 U.S. 347 (1967).

** The Restatement (Second) of Torts, adopted by most of the states as their own common law of privacy, recognizes protection of privacy interests from (i) intrusion, (ii) "false light" publicity, (iii) public disclosure of intimate embarrassing facts, and (iv) misappropriation.

*** 5 U.S.C. §552a.

**** 15 U.S.C. §1681 et seq.

As the foregoing testimony demonstrates, MPA believes there are adequate constitutional, statutory and common law protections already in place to protect privacy rights. These safeguards co-exist with, and are not pre-empted by, the Copyright Act. In this regard, we must respectfully but strongly disagree with Register of Copyrights Ralph Oman's June 6, 1991 Statement with respect to Title I of 2372 to the effect "that any state law or cause of action that provides equivalent rights for the copying or publication of copyrighted works would also be preempted. So it's the copyright law or nothing." (See Oman June 6, 1991 Statement at p. 7) MPA submits that privacy laws--which generally protect against intrusive conduct or the publication of private or highly offensive facts -- do not provide "equivalent rights" to those set forth in the Copyright Act which only protects the copyright owner's form of expression and not the facts contained in the copyrighted materials. Accordingly, MPA believes there has been, and will continue to be, no pre-emption problem under the Copyright Act with respect to the enforcement of privacy laws.

3. Berne Convention

A question was raised by Representative Moorhead during the May 30, 1991 Hearing with respect to the compatibility of Title I of H.R. 2372 with the Berne Convention. Our panel testified that there was no Berne Convention compatibility problem with respect to H.R. 2372. The Register of Copyrights agreed with this conclusion during his testimony at the June 6, 1991 Hearing. For your convenience, and in order to complete the record on this point, we reproduce below the testimony regarding the Berne Convention issue which I submitted on behalf of MPA during last year's Hearing (see Joint Hearing at pp. 254-57):

> "2. Berne Convention
>
> "Another issue which has been raised with respect to S.2370 and H.R.4263 is the effect of the recent adherence by the United States to the Berne Convention for the Protection of Literary and Artistic Works. MPA does not believe the Berne Convention poses any obstacles to passage of the proposed amendment.
>
> "To the extent questions have been raised as to whether the proposed amendment might conflict with the so-called 'moral rights' provisions of the Berne Convention, MPA responds by observing that Congress was extremely careful to refrain from incorporating a new 'moral rights' doctrine into federal law at the time of United States adherence to the Berne Convention. Thus, §2(3) ('Declarations') of the Berne

Convention Implementation Act of 1988 expressly states: 'The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.' (Emphasis supplied)

"Moreover, Congress made it clear in §2(2) of the Berne Convention Implementation Act that the Berne Convention is not self-executing in the United States and that '[t]he obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.'

"The Senate Judiciary Committee Report concerning The Berne Convention Implementation Act, after noting that 'moral rights' are not provided under federal law and that federal and state courts have rejected 'moral rights' claims, clearly states that "the 'moral rights' doctrine is not incorporated into the U.S. law by [the Berne implementing] statute." (Emphasis supplied) (Senate Judiciary Committee, Berne Convention Implementation Act of 1988, S.Rep.No.352, 100th Cong., 2d. Sess. 9-10.)

"Similarly, the House Judiciary Committee Report regarding The Berne Convention Implementation Act observes 'that the implementing legislation is absolutely neutral on the issue of the rights of paternity and integrity [moral rights]' and concludes that 'adherence to Berne will have no effect whatsoever on the state of moral rights protections in this country.' (Emphasis supplied) (House Judiciary Committee, Berne Convention Implementation Act of 1988, H.Rep.No. 609, 100th Cong., 2d Sess. 38).

"Accordingly, the legislative history and express language of the Berne Convention Implementation Act make it clear that Congress did not incorporate a new 'moral rights' doctrine into federal law by agreeing to United States adherence to the Berne Convention. MPA believes the 'moral rights' doctrine should not now be permitted to be utilized by opponents to passage of S.2370 and H.R.4263 to deny publishers and authors the right under the Copyright Act to make fair use of unpublished materials.

"Moreover, MPA submits that the language of the Berne Convention does not bar the proposed amendment. Thus, while Article 10(1) of the Convention appears to limit quotations to portions taken from a work 'which has already been lawfully made available to the public,' Article 9(2) expressly provides that '[i]t shall be a matter for legislation in the countries of the Union to permit the

> reproduction of [literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'
>
> "MPA submits that the four fair use tests set forth in §107 of the Copyright Act -- which tests mirror the concerns addressed in Article 9(2) of the Berne Convention -- provide ample protection to copyright owners of unpublished materials to avoid prejudicing such owners' 'legitimate interests'. We do not believe Congress intended in adhering to the Berne Convention to preclude fair use of unpublished materials. It would be surprising, indeed, if United States adherence to the Berne Convention resulted -- without any debate regarding this important issue -- in the elimination or restriction of magazine publishers' and journalists' rights under the fair use provisions of the Copyright Act and under the First Amendment to quote from previously unpublished information."

4. Broadcasting News Monitoring Services

Finally, we read with interest the Statement of Robert C. Waggoner submitted to this Committee on behalf of the International Association of Broadcast Monitors ("IABM"). Without getting into the relative merits of the IABM's controversial claims under the "fair use" provisions of the Copyright Act or their relevance to Title I of H.R. 2372, MPA submits that all such claims by the IABM and any proposed legislative remedies sponsored by the IABM should be reviewed carefully by this Committee separately from the clearly distinguishable issues giving rise to the carefully crafted compromise language set forth in Title I of H.R. 2372.

Conclusion

For the above reasons and for those set forth in my written and oral testimony, I respectfully urge this Committee to expedite passage of Title I of 2372. MPA believes this proposed legislation is clearly in the public interest. We respectfully but strongly disagree with Register of Copyrights Ralph Oman's suggestion that your proposed amendment is designed to protect "specialized interests" (see Oman Statement, June 6, 1991, at p. 3) or that the proposed legislation would somehow transform the "fair use" doctrine into a "detailed, rigid, Napoleonic Code-like provision" designed to protect "specialized users of copyrighted material." (Id. at 11) If legislation such as Title I of H.R. 2372 is "special interests" legislation, then the Copyright Act, expressly intended "to promote the Progress of Science and useful Arts", would also qualify as "special

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interests" legislation. Title I of H.R. 2372 -- which favors no specific industry or "special interest" group -- is intended to, and we believe would if enacted, serve the broad educational and public illumination purposes of the Copyright Act. We urge its speedy passage.

Sincerely,

Kenneth M. Vittor

KMV:pag

cc: The Honorable Carlos J. Moorhead, Ranking Minority Member
Members of Subcommittee on Intellectual
Property and Judicial Administration

APPENDIX 3.—LETTER FROM FLOYD ABRAMS, ESQ., CAHILL GORDON & REINDEL, WITH ATTACHED STATEMENT, TO HON. WILLIAM J. HUGHES, JUNE 5, 1991

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June 5, 1991

Dear Congressman Hughes:

I write to supplement two responses I provided during my oral testimony last week with respect to H.R. 2372.

Representative Moorhead asked me a question with respect to the consistency of H.R. 2372 with the Berne Convention. At that time I referred to my testimony last July at a Joint Hearing before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary and this Committee in which I addressed that subject. I enclose a copy of my testimony with this letter and refer the Committee to pages 203-214 of the printed transcript thereof. A summary of that testimony follows:

> The Berne Convention contains a fair-use scheme similar to that contained in United States copyright law: it grants an exclusive right of reproduction to the creator of a work, but permits reproduction by others for certain purposes (as defined by each individual member country). Nowhere in the Berne Convention's fair-use scheme, however, is there a distinction between published and unpublished works or a recognition of a right of first publication. Our Copyright Act does make such a distinction; it gives an author the right to distribute copies of the copyrighted work, a

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> right that includes the right of first publication. Because American courts have, to some extent, treated this right to first publication as different from other statutory rights, the balance of equities in a claim of fair use of unpublished works has weighed heavily against fair use, sometimes so heavily that a finding of fair use of unpublished works has been all but precluded. Thus, our law has distinguished between published and unpublished work to an extent that is neither recognized nor endorsed by the Berne Convention. By assuring that fair use of unpublished works is determined on the basis of all the fair use factors, American law would not only be compatible with the Berne Convention, but would represent a major step toward compliance with our international obligations under it.

The second topic I would like to address is that of privacy, particularly in light of a number of questions raised by Representatives Glickman and Frank. I would, on further reflection, respond to those questions as follows:

There is authority for courts applying the fair use test to go beyond the four factors set forth in Section 107 and to consider general equitable concerns in determining what use is and is not fair. The emphasis in Justice O'Connor's majority opinion on the supposed "piracy" by The Nation in Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 550-552 (1985) is one example. Another is Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984) (applying an "equitable rule of reason").

While it is thus a plausible reading of the Copyright Act to permit judges to consider such factors in determining what is fair, I believe it is more consistent with Section 107 and with sound public policy to limit judicial consideration of fair use to the four factors set forth in Section 107 and no others. A particularly powerful argument to that effect was made by Judge Pierre Leval in an article published by him in the Harvard Law Review. I enclose a copy of it for the Committee's consideration.

Representative Frank asked me a number of hypothetical questions designed to explore whether (however Section 107 is now interpreted) copyright law should presumptively deem a use of any unpublished material as unfair if the material at issue was obtained illegally by a journalist or in some similarly surreptitious manner. I note, at the outset, that I am unaware of any copyright case in which those facts were present. In fact, I am unaware of any situation in which a journalist stole or pilfered copyrighted material and then quoted from it in some article. I am, to be sure, aware of many "leaked" memoranda, letters and the like which have been quoted in the press. Any new limitation on the ability to quote from such material would, I believe, raise the gravest First Amendment issues.

What though, of Representative Frank's inquiry as to whether any use of such material should be deemed presumptively unfair -- with, perhaps, some built in First Amendment exception? My response is negative and is as follows:

Copyright law exists "to promote the progress of Science and useful Arts." U.S. Const. Art. 1, § 8, cl. 8. That is its sole constitutional purpose. I believe any use of the law to punish behavior that is viewed as morally unacceptable that is not aimed at furthering the creative process is unsupported in the Constitution and might well be unconstitutional.

Copyright law, by its nature, protects only expression -- not facts or our ideas. Privacy of thoughts, privacy of facts, privacy of anything but expression is not only unprotectable under the current copyright law but under any we have ever had. In fact, if copyright law sought to protect facts or ideas -- e.g., to grant a monopoly in them -- it would run counter to the single most accepted, least controversial provision of that law. A recent Supreme Court opinion put it this way:

> "'No one may claim originality as to facts.' This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence . . . . [Thus, facts] 'may not be copyrighted and are part of the public domain available to every person.'" Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 111 S. Ct. 1282, 1287-89 (1991) (citations omitted).

Thus, unless Congress were to consider a radical -- and in my view radically unwise -- revision of law, the only privacy-related interest that could be protected is the privacy of the expression found in a letter, diary or the like.

I have previously adverted to Judge Leval's article and the general position taken therein that only the 4 statutory factors set forth in Section 107 should be considered in determining if a use is fair. Judge Leval's specific treatment of privacy is, I believe, persuasive. It reads, in its entirety (without footnotes) as follows:

"The occasional attempt to read protection of privacy into the copyright is also mistaken. This trend derives primarily from an aberrational British case of the mid-nineteenth century in which there had been no replication of copyrighted material.

"Queen Victoria and Prince Albert had made etchings which were exhibited privately to friends. The defendant Strange, a publisher, obtained copies surreptitiously. Strange wrote descriptions of the etchings and sought to publish his descriptions. Prince Albert brought suit to enjoin this intolerable intrusion. The Lord Chancellor, expressing concern for the privacy of the royal family and disapproval of the surreptitious manner by which the defendant had obtained copies of the etchings, affirmed the grant of an injunction.

"Prince Albert's case is noteworthy as the seed from which grew the American right of privacy, after fertilization by Brandeis and Warren. But it should not be considered a meaningful precedent for our copyright law. The decision reflects circumstances that distinguish British law from ours -- particularly the absence from British law of two of our doctrines. First, although British society placed a higher value on privacy than we do, English law did not have a right of privacy. In this country, a right to privacy has explicitly developed to shield private facts from intrusion by publication. Second, British law did not include a strong commitment to the protection of free speech. American law, in contrast, maintains a powerful constitutional policy that sharply disfavors muzzling speech.

"Serious distortions will occur if we permit our copyright law to be twisted into the service of privacy interests. First, it will destroy the delicate balance of interests achieved under our privacy law. For example, the judgment that, in the public interest, the privacy right should terminate at death would be overcome by the additional fifty years tacked onto copyright protection. Such a change would destroy the policy judgment developed under privacy law denying its benefits to persons who have successfully sought public attention. In addition, as a result of the preemption provisions of the federal copyright

> statute, construing the copyright law to encompass privacy might nullify state privacy laws.
>
> "Moreover, the copyright law is grotesquely inappropriate to protect privacy and obviously was not fashioned to do so. Copyright protects only the expression, not the facts revealed, and thus fails to protect the privacy interest involved. Because the copyright generally cannot be enforced without a public filing in the Library of Congress, the very act required to preserve privacy would ensure its violation. Finally, incorporating privacy concerns into copyright would burden us with a bewilderingly schizophrenic body of law that would simultaneously seek to reveal and to conceal. Privacy and concealment are antithetical to the utilitarian goals of copyright."

For the above reasons and for those set forth in my written and oral testimony, I respectfully urge this Committee favorably to report out H.R. 2372 in the very form that it has been so laboriously negotiated. It is, to be sure, for Congress alone to decide what copyright law will best serve the public. In this instance, I submit, the modest amendment embodied in Title I of H.R. 2372 is precisely what is needed to deal with the pressing problem with which authors, publishers and ultimately the public is faced.

Sincerely,

Floyd Abrams

The Honorable William J. Hughes
Chairman
Subcommittee on Intellectual Property
  and Judicial Administration
207 Cannon House Office Building
Washington, D.C. 20515

cc: The Honorable Carlos J. Moorhead
The Honorable Dan Glickman
The Honorable Barney Frank
Hayden W. Gregory, Counsel

Statement of Floyd Abrams
before a joint hearing of the
House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property,
and the
Administration of Justice
and the Senate Committee on the Judiciary
Subcommittee on Patents, Copyrights and Trademarks
July 11, 1990

Mr. Chairman and distinguished committee members: I appear, at your invitation, to testify in support of the adoption of S. 2370 and H.R. 4263, legislation designed to assure that fair use principles are applied to unpublished as well as published works. I appear to express the concern of and support for this legislation of the American Historical Association, the Organization of American Historians, the National Writers Union, the Authors' Guild, Inc., PEN American Center and the Association of American Publishers. I appreciate your invitation, and am delighted to have the chance to testify before you.

I have more than once encountered the topic of these hearings in litigation on behalf of clients: I was counsel to _The Nation_ in the unsuccessful defense of their position in _Harper & Row_ v. _Nation Associates_[1]; I represented Random House, Inc. in their unsuccessful effort to persuade the Supreme Court to grant a writ of _certiorari_ in the case brought against it by J.D. Salinger[2]; and I, together with Professor Leon Friedman, unsuccessfully urged the Supreme Court on behalf of PEN American Center and the Authors Guild Inc., as _amici curiae_, to grant a writ of *certiorari* in the case of *New Era Publications Int. v. Henry Holt & Co.*[3] No one with the won-loss record reflected in these cases could fail to be described as an expert in this area. I hope, however, you will indulge me in the assumption that in other areas of law I have occasionally done better. More than that, I hope you will agree with me that the legislation about which these hearings center should be adopted.

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[1] 471 U.S. 539 (1984).

[2] _Salinger_ v. _Random House, Inc._, 811 F.2d 90 (2d Cir. 1987), _cert. denied_, 484 U.S. 890 (1987).

The need for the adoption of new legislation in this area did not arise overnight. It is not the product of one litigation or of one ruling, and certainly not the views of any one judge. To some degree, it arises from the language of Section 107(2) of the Copyright Act itself; that section states that "the nature of the copyrighted work" shall be one factor to be taken into account in determining if a use of another's expression was "fair." What is it talking about? The nature of the work in the sense of a biography or a cookbook? A poem or a musical composition? The fact that a work is predominantly factual? Or whether the quoted-from work was previously published or unpublished?

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[3] 873 F.2d 576 (2d Cir. 1989), *reh'g denied en banc*, 884 F.2d 659 (2d Cir.), *cert. denied*, 110 Sup. Ct. 1168 (1990).

Prior to the Supreme Court's ruling in the Nation case, the relevance of the unpublished character of a work was hardly clear. With the abolition in 1976 of publication as what the House Report characterized as the "dividing line between common law and statutory protection and between both of these forms of legal protection and the public domain,"[4] the argument was certainly plausible that the determination of fair use, as well, was not to be made based upon the published or unpublished status of the work at issue. So was the competing contention that, as a Senate Report observed, "[t]he applicability of the fair use doctrine to unpublished works [remains] narrowly limited."[5]

In its ruling in the Nation case, the Supreme Court opted for the second view, concluding that "under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." 471 U.S. at 555. Two years later, in Salinger, the Court of Appeals for the Second Circuit concluded that unpublished works "normally enjoy complete protection against copying." And in the still more recent ruling of the

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[4] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 129 (1976).

[5] S. Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1975).

Court of Appeals in the *New Era* case, the Court of Appeals concluded that publication of even "a small . . . body of unpublished material cannot pass the fair use test, given the strong presumption against fair use of unpublished work." 873 F.2d at 583.

These rulings have had enormous practical as well as theoretical impact. As a result of the rulings, history cannot now be written, biographies prepared, non-fiction works of almost any kind drafted without the gravest concern that even highly limited quotations from letters, diaries or the like will lead to a finding of copyright liability and the consequent issuance of an injunction against publication. Subjects of biographies and their heirs have been provided a powerful weapon to prevent critical works from being published. They have used it unsparingly. Authors have been obliged to characterize -- without quoting, without paraphrasing -- what their subjects have said, thus making it impossible for readers to pass judgment for themselves about the nature of what was, in fact, said. So acute is the concern wrought by these rulings that Arthur Schlesinger Jr. has observed, "[i]f the law were this way when I wrote the three volumes of The Age of Roosevelt, I might still be two volumes short."[6]

At the risk of belaboring the point, allow me to guide you on a brief trip through current legal doctrine. In The Nation, as I have said, the Supreme Court declared that "under ordinary circumstances" a claim of fair use would not be sustained as regards an unpublished work. 471 U.S. at 555. That determination, as later construed and applied by the Court of Appeals for the Second Circuit, has made it all but impossible for alleged infringers to meet the four-part test that, according to Section 107, a court must consider to determine whether or not a use was fair. Enacting this bill into law will eliminate that nearly insurmountable presumption against a finding of fair use while still leaving the courts free to engage in a detailed examination of what use is and is not fair.

The Nation case included a crucial and lengthy preliminary discussion explaining why uses of unpublished works find less favor under the Section 107 factors than uses of published works. The Court noted, citing an earlier decision, that the grant of copyright monopoly is "'intended to motivate

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[6] Newsweek, December 25, 1989, p. 80.

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the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after [a] limited period of exclusive control has expired.'" 471 U.S. at 546, citing Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984). The Court declared that a holder of a copyright possesses a special right first to publish his work. But whereas Section 106(3) of the Copyright Act sets forth that right as one of those possessed by a copyright owner (and thus, presumably, subject to fair use under Section 107) the Court went far toward elevating the right of first publication to being the Act's most significant right. 471 U.S. at 553. It observed that the purpose of the copyright clause was "to increase, and not to impede the harvest of knowledge." 471 U.S. at 545. It then presumed that the crucial economic incentive to create lay in retaining the right to disseminate to the public one's own work and that allowing liberal fair use would rob a copyright holder of the commercial value of that right. Thus, it forged a crucial link between the right of first publication and the purpose served by the copyright clause -- maintaining an incentive to produce works of artistic and intellectual genius. But in so doing, the Court seemed to suggest that a historian or other scholar can use unpublished material fairly only in the most extremely limited circumstances, lest the purpose served by the copyright monopoly be transgressed.

Recall now the four factors considered by a court to determine fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. Citing the Nation's preliminary discussion emphasizing the limited circumstances in which use of unpublished documents is protected by fair use, the opinions of the Second Circuit have "place[d] special emphasis" on the second factor -- the nature of the copyrighted work. Salinger, 811 F.2d at 96. As read by the Second Circuit, then, The Nation requires the courts to make a redundant and, from the point of view of the secondary user, a loaded inquiry. A court must place "special emphasis" upon the second factor; if a work is unpublished, the alleged infringer will, in the ordinary course and for that reason alone, lose on the second factor; and if the accused loses on the second factor, then he or she is well on the way to losing the case.

From an adverse decision on the second factor, it is a natural -- almost inevitable -- step under current law for a court to find against the defendant on the fourth factor, the effect of the use on the market for the copyrighted work -- which the courts have consistently concluded is "the single most important element of fair use." Nation, 471 U.S. at 566. Since the crucial preliminary question is whether the copyright holder has in fact exercised the right to publish, any dissemination before he does so will by definition interfere with a writer's opportunity initially to publish. In Salinger, for example, the Second Circuit noted that "the impairment of the market seems likely [because t]he biography copies virtually all of the most interesting passages of" Salinger's unpublished letters. 811 F.2d at 99. It is not coincidental that in neither case interpreting the Nation has the Second Circuit not found some impairment of the market. And so, the fact that a work is unpublished leads speedily -- and dangerously easily -- to a ruling by rote in favor of the plaintiff on the critical fourth factor. With this victory in hand -- the second factor plus the "most important" fourth factor -- the plaintiff cannot lose. And the plaintiff does not lose.

Something is missing from this analysis. Is it not possible to distinguish between kinds of appropriations of unpublished material? Surely a difference exists between the writer who quotes extensively from previously unpublished poems simply to take advantage of particularly mellifluous expression and the historian who quotes the expression because it is necessary to explain the nature of the poet's literary contribution. Surely, the effect on the market of the unpublished material is considerably more pronounced in the former case, where the reading public first glimpses everything in and of itself, than in the latter case, where the public views the unpublished expression as central to an independant work of criticism. Under the law currently being enforced, courts simply do not ask these questions.

There have, to be sure, been some indications that recent fair use rulings allow the quotation of at least some unpublished material. For example, in his opinion denying a petition for a rehearing of *New Era*, Judge Miner responded to critics of the Court's original conclusion with the observation that "there is nothing in the [*New Era*] majority opinion that suggests" certain small amounts of unpublished expression would not constitute fair use. 884 F.2d at 661. Judge Newman, the author of the Second Circuit opinion in *Salinger*, asserted, in support of reconsidering *New Era*, that "the doctrine of fair use permits some modest copying of an author's expression in those limited circumstances where copying is necessary fairly

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and accurately to report a fact set forth in the author's writings." *Id*. at 661.

But these words do not solve the problem. Any fair use analysis involves inherently unquantifiable judgments. The question of how much use of another's expression is too much will be with us as long as the concept of fair use itself is with us. But with the addition of the concept that virtually any use of expression from unpublished works is unfair, any delicate balancing process has been undone.

Although the Second Circuit decisions have exacerbated the situation created by this portion of the *Nation* ruling, the central problem -- the problem addressed by these bills -- remains the strong presumption against finding fair use for unpublished material articulated in the *Nation* case itself. I do not come before you, then, simply to ask for the supposed "overruling" of dicta in the Second Circuit's *New Era* opinion, as one commentator has advised this committee.[7] Instead, what needs rethinking -- and a legislative response -- is the very analytical framework of this issue that insists that the unpublished character of a work should weigh heavily against any quotation from it being deemed fair.

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[7] Letter from Jane C. Ginsburg to Representative Robert Kastenmeier 3 (June 25, 1990) [hereinafter Ginsburg letter].

Why should this be so? Why should it be so at all? In some circumstances, the unpublished character of, say, a quoted-from poem or essay about to be published may well gravitate against a finding of fair use. But why should the disclosure of the "smoking gun" quotation from a letter written by a corrupt political leader even be presumed to be unfair? Why should Robert Caro's use of any quotations from the papers of Robert Moses in Caro's preparation of his critical -- and Pulitzer-Prize winning -- biography, "The Power Broker," be deemed presumptively unfair? Why should James Reston, Jr., the author of a recent biography of John Connolly, have had to limit significantly his use of letters written from Mr. Connolly to President Lyndon B. Johnson because (as Reston wrote) "no author could bear [the] risk" that any such use would now be deemed unfair?[8] Why should Bruce Perry, the author of a forthcoming biography of Malcolm X, have been forced to delete "a great deal of material" from letters of his subject which are essential to conveying his character because of threats from his widow that she is "quite concerned" about the biography being written without her consent?[9] Why, as well, should Victor Kramer, a literature scholar who has been working on a biography of James Agee, thus far have been simply unable to publish his work because of opposition by the executor of the Agee estate?[10] The problem lies with the presumption itself, not with any particular judicial application of it.

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[8] Letter from James Reston, Jr. to Arthur M. Schlesinger, Jr., quoted in Brief Amici Curiae of PEN American Center and the Authors Guild Inc. in Support of Petition for Certiorari (No. 89-869).

In the end, the presumption against any use of unpublished expression being deemed fair misapprehends the way historians, biographers and others go about their efforts. Judge Leval made this point eloquently:

> First, all intellectual creative activity is in part derivative. There is no such thing as a wholly original thought or invention. Each advance stands on building blocks fashioned by prior thinkers. Second, important areas of intellectual activity are explicitly referential. Philosophy, criticism, history, and even the natural sciences require continuous reexamination of yesterday's theses.

Quoting or paraphrasing expression often is the key to this enterprise. It creates understanding, not simply dry knowledge. It allows us to appreciate inference, to explain nuance. It allows us to probe the state of mind of historical figures. Creating a foreboding and legalistic presumption against this sort of enterprise harms our understanding of ourselves and thus fails to fulfill the purposes of the copyright law. As long as the far "narrower standard" for unpublished documents remains, a court's four-factor inquiry will always complete itself before it begins. The chance that a use of unpublished works will be determined to be "fair" will be slim, at best -- and, more often, non-existent.

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[9] Letter from Bruce Perry to Senator Paul Simon (July 4, 1990).

[10] Chronicle of Higher Education, April 18, 1990, p. A48.

Informed criticism, history or biography takes years to create. Those who do so serve all of us by their efforts. With increasing frequency, those who write these works have been constrained in their efforts, threatened by a body of law that has rigidly enforced a legal proposition that inhibits scholarship by chilling the publication process itself. The bills before you will go far to ending that chill by permitting the weighing of particular uses against the assuredly significant copyright owner's right to be the first disseminator of his private work. I do not for a moment suggest that the right of first publication -- and the commercial value that flows from it -- is not important or that it should not play a large part in a court's fair use analysis. But by eliminating a

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general presumption which so disfavors the use of unpublished expression that virtually all non-fiction writing has been put at peril, these bills will serve us all.

Copyright Injunctions

There is an additional disturbing element of this jurisprudence that I would like to address: the rather promiscuous way in which courts issue injunctions for violations of the copyright laws. In the context of unpublished expression, my concerns are even stronger.

In Salinger, Judge Newman concluded that if a biographer "copies more than minimal amounts of [unpublished] expressive content, he deserved to be enjoined." 811 F.2d at 96.[11] Based upon Judge Newman's language, the majority opinion in New Era declared that "[s]ince the copying of 'more than minimal amounts' of unpublished expressive material calls for an injunction barring unauthorized use . . . the consequences of the district court's finding [that a small, but more than negligible, amount was unfairly used] seem obvious." 873 F.2d at 584. Explaining his views in his response to the motion for rehearing, Judge Miner made plain that "under ordinary circumstances" use of more than minimal amounts requires an injunction. 884 F.2d at 662.

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[11] Judge Newman later explained in his dissent from the decision not to rehear the New Era case, the "sentence from Salinger was concerned with the issue of infringement, not the choice of remedy." 884 F.2d at 663 n.1.

In my view, both the language of the Salinger and the New Era rulings are consistent with the law that has generally existed in this area. It is perfectly accurate for Judge Miner to conclude that at least under "ordinary circumstances" injunctions routinely follow findings of copyright liability. So they have. But should they?

I start with the proposition, not unknown in First Amendment law, that injunctions on books are generally anathema to a free society. Prior restraints are generally viewed "as the most serious and least tolerable infringement on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). We do not permit prior restraints in libel cases, no matter how persuasively a plaintiff demonstrates harm caused by the intended speech. The Supreme Court, to this date, has never held constitutional any prior restraints on publication by a newspaper. Why, then, are we quite so willing to interpret copyright law to require even the near-automatic issuance of an injunction against the publication of a book which includes in it some infringing material? If the First

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Amendment prevented a court from enjoining the entire Pentagon Papers, notwithstanding the national security concerns cited by the government which were explicitly accepted by a majority of the Court, why should selective unpublished quotations used in a significant piece of history or scholarly criticism routinely be subjected to the literary equivalent of capital punishment known as an injunction?

I suggest no more than that, at the least, courts should weigh carefully what remedy should be awarded even after a finding of infringement. Enjoining publication of a book is serious, and ritualistic incantation of the availability of injunctions in copyright cases makes it no less so.[12] I thus agree with the views of Chief Judge Oakes in his opinion in *New Era*, in which he said that "a non-injunctive remedy [often] provides the best balance between the copyright interests and the First Amendment interests at stake" in any given case. 873 F.2d at 597.

On one level, enacting this bill into law should go a long way toward reducing the number of nearly automatic injunctions by reducing the number of infringement claims against publishers and authors who make selective use of unpublished expression. But the injunction issue cuts deeper. I join other commentators in urging Congress formally to request the Copyright Office to evaluate how frequently and with what justification courts issue injunctions against publishers and authors in infringement cases. The Copyright Office should submit to Congress the results of its findings and Congress should review those findings, reflecting carefully on the profound implications for the First Amendment they may suggest.

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[12] Not insignificantly, the Copyright Act implicitly repudiates the automatic issuance of an injunction. It provides simply that "any Court . . . *MAY* . . . grant temporary and final injunction." (emphasis supplied)

The Berne Convention

The proposed amendment provides the additional benefit of bringing our copyright law more in line with the international copyright standards set forth in the Berne Convention.[13] It has been argued before this Committee[14] that the amendment is somehow incompatible with the Berne Convention. As I will indicate later, it appears on the contrary that passage of this bill may well be a major step toward compliance with our international obligations.

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[13] Berne Convention for the Protection of Literary and Artistic Works, Paris Act of June 24, 1971 [hereinafter Berne Convention].

[14] *See* Ginsburg Letter 4.

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Before reaching that issue, however, I start with a far easier one: whether, and to what extent, our adherence to the Berne Convention restricts the ability of the Congress to amend American copyright law. The Berne Convention Implementation Act of 1988[15] makes plain that the Convention is "not self-executing."[16] The Act further states that "[t]he obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law."[17] Finally, the Convention itself gives authors protections "in countries of the Union other than the country of origin" of the work.[18] What all this boils down to is the following: the Berne Convention is not American law; the Berne Convention can be followed only by applying American law; and the Berne Convention simply does not apply to American authors filing claims in American courts for their unpublished works or their works published in the U.S.[19]

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[15] Pub. L. No. 100-568, 102 Stat. 2853 (1988) [hereinafter Implementation Act] (codified as amended in scattered sections of 17 U.S.C.).

[16] Id. § 2(1), 102 Stat. at 2853.

[17] Id. § 2(2), 102 Stat. at 2853.

[18] Berne Convention, art. 5(1). The "country of origin" of a work is determined according to elaborate rules set forth in the Berne Convention, art. 5(4).

The Berne Convention, in any event, employs a "fair use" scheme similar to our own: it gives an exclusive right of reproduction to the creator of a work,[20] but permits reproduction by others for certain purposes.[21] The Convention

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[19] *See Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 Colum.-VLA J.L. & Arts 513, 516-17 (1986). *See also* 3 M. Nimmer & D. Nimmer, *Copyright* § 17.01[B], at 17-8 (1989) (protections provided by Convention are "*minimum standard[s]*, which the United States must accord to Convention claimants but need not make available to Americans"); S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, § 5.71, at 212 (1987) ("For his unpublished works, an [American] author receives in [the U.S.] the protection of [American] law, but none of the rights 'specially granted' by the Convention.").

For their works published abroad in a Berne Union member nation, American authors filing a claim here would receive both domestic law protection and Berne protection. *See* S. Ricketson, § 5.71, at 212. Their Berne claims, like the claims of foreign nationals whose works are published abroad, might be unenforceable if our law did not support the claim. This is because Berne is given effect here only under our law. *See* Implementation Act § 3(a).

[20] *See* 17 U.S.C. § 106(a), (c) (1982); Berne Convention, art. 9(1).

[21] *See* 17 U.S.C. § 107 (1982); Berne Convention, arts. 9(2) (general exception), 10(1) (use of quotations), 10(2) (use in teaching), 10bis(2) (use for reporting). One provision permits reproduction of published articles without employing a fair use analysis. *See* Berne Convention, art. 10bis(1).

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explicitly declares that "[i]t shall be a matter for legislation in the countries of the Union" to define those "certain special cases" in which reproduction is allowed.[22]

The purpose of this scheme, as elaborated in the leading treatise on the Berne Convention, has a familiar ring to American ears:

> "[T]hese might be described as instances when it is considered that the 'public interest' should prevail against the private interests of authors. . . . In truth, 'public interest' is a shifting concept that requires a careful balancing of competing claims in each case."[23]

The members of the international copyright community perform this careful, fact-dependent, case-by-case equitable analysis by instructing their courts[24] to consider several factors. These include the following:

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[22] Berne Convention, art. 9(2).

[23] S. Ricketson, § 9.1, at 477 (1987). *See also* World Intellectual Property Organization, Pub. No. 615(E), *Guide to the Berne Convention* § 10.1, at 58 (1978) [hereinafter *Guide*] ("[T]he[] aim [of limitations on the exclusive right] is to meet the public's thirst for information.").

[24] *See, e.g.*, *Guide*, § 10.4, at 59 ("The fairness or otherwise of what is done is ultimately a matter for the courts. . . .").

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(1) the reproduction should "not conflict with a normal exploitation of the work";[25]

(2) it should "not unreasonably prejudice the legitimate interests of the author";[26]

(3) it should be "compatible with fair practice";[27] and

(4) the extent of the use should be "justified by the purpose."[28]

Both American law and the Berne Convention express an interest in preserving an author's "property interest in exploitation of prepublication rights."[29] Prior to 1976, our law did so, in good part, by erecting a wall between published and unpublished works. The Berne Convention, on the other hand, directs courts to consider an alleged infringement of that interest in exploitation of the work as part of the fair use equitable analysis.

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[25] Berne Convention, art. 9(2).

[26] *Id.*

[27] *Id.*, arts. 10(1), (2).

[28] *Id.* *See also id.*, art. 10bis(2) ("[T]o the extent justified by the informatory purpose.").

[29] *Nation*, 471 U.S. at 555.

Nowhere in the Berne Convention has the international copyright community categorically excluded unpublished works from a fair use analysis. There is no published v. unpublished distinction in the Berne Convention's fair use scheme. To abolish such a distinction in our law would make American law more not less compatible with the Berne Convention.

The explanation as to why American copyright law differs from international copyright law in this regard appears straightforward. Our Copyright Act gives an author the right "to distribute copies . . . of the copyrighted work."[30] That right includes "a distinct statutory right of first publication."[31] The Berne Convention does not recognize such a general right,[32] though it has lately considered doing so.[33]

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[30] 17 U.S.C. § 106(3) (1982).

Where we have strayed from the international consensus is in how to consider this right of first publication in the fair use balance. The courts have treated this right as "inherently different,"[34] from other statutory rights. The result is that, for unpublished works, "the balance of equities in evaluating . . . a claim of fair use inevitably shifts."[35]

On the other hand, the Berne Convention puts no such heavy thumb on the equitable scale. The Convention's basic right of reproduction[36] is directly limited by a fair use

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[31] Nation, 471 U.S. at 552.

[32] See S. Ricketson, § 8.48, at 409. The Convention does provide for a right of circulation in certain limited circumstances. See Berne Convention, art. 14(1) (right of distribution of cinematographic adaptations and reproductions), art. 14ter (optional provision conferring right to interest in sale of work subsequent to first transfer of the work by the author), art. 16 (right of seizure of infringing copies); see also S. Ricketson, § 8.42, at 403.

[33] See S. Ricketson, §§ 8.47-8.48, at 407-09.

[34] Nation, 471 U.S. at 553.

[35] Id.

[36] See Berne Convention, art. 9(1). The exclusive right of reproduction is considered the central right. See S.

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analysis without regard to whether the work is published or unpublished.[37] Further, when the Convention most recently considered enacting an explicit right of first publication, it did so in the context of that basic right of reproduction.[38] Even if our law were exactly the same as the Berne Convention in this respect, the Convention would grant no special status to unpublished works; an unadulterated fair use analysis would still apply. The bottom line is that the wall our law has built between published and unpublished works is neither recognized nor endorsed by the Berne Convention. This proposed legislation would tear down that wall and harmonize our law with the Berne Convention.

Much has been made in statements before this Committee[39] of a single phrase embedded in the broader Berne fair use scheme. That phrase is "lawfully made available to

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Footnote continued from previous page.

Ricketson, § 8.6, at 369 (characterizing art. 9(1) as "the general right," and the other rights, including the enumerated limited distribution rights, as "its derivatives"); Guide, § 9.1, at 54 (characterizing the right in art. 9(1) as "the very essence of copyright").

[37] See S. Ricketson, §§ 9.16-9.17, at 488-89.

[38] See id., §§ 8.47-8.48, at 407-09.

[39] See, e.g., Ginsburg Letter 4.

the public," and it describes the works from which quotations can fairly be made.[40] From this phrase, all sorts of restrictions have been read into the Berne Convention's fair use provisions and laid before this Committee. You have been told that for any use to be deemed fair, a work must have been "publicly disclosed";[41] that it must have been "intended for the public in general";[42] that "affirmative dissemination" of the work is required, for "mere[] accessib[ility]" is not enough;[43] and that an "authorial intent to disclose" the work is required.[44] Finally, you have been told that the whole enterprise in which you are engaged today "flout[s] our Berne obligations."[45]

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[40] Berne Convention, art. 10(1).

[41] Ginsburg Letter 5.

[42] *Id*. (quoting *Guide*, § 10.3, at 58). Professor Ginsburg cites the *Guide* as "authoritative"; the *Guide* itself states that it "is not intended to be an authentic interpretation of the provisions of the Convention since such an interpretation is not within the competence of the International Bureau of WIPO." *Guide* at 4 (preface of Arpad Bosch, Director General, WIPO).

[43] Ginsburg Letter 5.

[44] *Id*.

[45] *Id*.

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I offer four brief responses to this parade of interpretive horribles. First, the results of such an interpretation of the Berne Convention would be radical. If this interpretation were correct, it would require a total bar on _any_ fair use of unpublished works -- however brief, however significant, however insignificant. This extraordinarily draconian solution goes even farther than -- and in fact, is at odds with -- the _Nation_, _Salinger_ and _New Era_ cases.

Second, not a word in the detailed and prolonged consideration by Congress of the Berne Convention even relates to this topic. It would, as Kenneth M. Vittor's testimony to you for the Magazine Publishers of America points out, "be surprising, indeed, if United States adherence to the Berne Convention resulted -- without any debate regarding this important issue -- in [such an] elimination or restriction of magazine publishers' and journalists' rights . . . ."[46]

Third, the language about "lawful availability" makes no mention of publication. "Published works" are defined in the Berne Convention as "works published with the _consent of their authors_."[47] Moreover, the legislative history of the

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[46] Statement of Kenneth M. Vittor 19-20.

[47] Berne Convention, art. 3(3) (emphasis added).

"lawful availability" phrase makes clear that it relates to "*every means* by which the work is lawfully made *accessible* to the public."[48] Those opposed to this amendment would have you believe that notions of consent and authorial intent and affirmative dissemination -- notions bound up in the concept of publication -- are allowed to sneak in through the back door and restrict Berne's fair use analysis. That is not the case.

Finally, it is unpersuasive to maintain that this amendment is improper because "our Berne membership underlies . . . our continued exploration of legislation affording greater protections to creators."[49] To the extent this suggests that it would be inconsistent with our Berne Convention obligations ever to limit to even the slightest degree the rights of those who claim infringement, it is simply insupportable. When the United States implemented the Berne Convention, for example, it explicitly did not incorporate the so-called "moral rights" doctrine into our law.[50] The proper way to

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[48] Records of the Intellectual Property Conference of Stockholm, June 11 - July 14, 1967, Vol. I, 107 (Doc. S/1) (emphasis added); *see also* S. Ricketson, § 7.22, at 339, § 9.22, at 491.

[49] Ginsburg Letter 4.

[50] *See* S. Rep. No. 352, 100th Cong., 2d Sess. 10, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3706, 3715. *See also* Statement of Kenneth M. Vittor 17-19.

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confer rights on artists is through carefully crafted legislation, not by an interpretation of the Berne Convention which reads it as a one-way ratchet barring any Congressional amendment to our copyright law on the ground that the revision might adversely affect creators. Artists' interests after this amendment will be fully protected by an equitable analysis, just as they are protected by the Berne Convention's equitable analysis.

The Berne Convention applies fair use analysis without any threshold reference to the publication status of a work. Our copyright law makes such a threshold reference. This amendment would render our law more not less compatible with the Berne Convention.

COMMENTARY

TOWARD A FAIR USE STANDARD

BY

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COMMENTARIES

TOWARD A FAIR USE STANDARD

Pierre N. Leval[*]

Random distribution has dealt me a generous share of copyright suits involving claims of fair use. The court of appeals' disagreement with two of my decisions[1] provoked some rethinking, which revealed that my own decisions had not adhered to a consistent theory, and, more importantly, that throughout the development of the fair use doctrine, courts had failed to fashion a set of governing principles or values. Is this because no rational defining values exist, or is it rather that judges, like me, have repeatedly adjudicated upon ad hoc perceptions of justice without a permanent framework? This commentary suggests that a cogent set of governing principles exists and is soundly rooted in the objectives of the copyright law.

Not long after the creation of the copyright by the Statute of Anne of 1709,[2] courts recognized that certain instances of unauthorized reproduction of copyrighted material, first described as "fair abridgment," later "fair use," would not infringe the author's rights.[3] In the United States, the doctrine was received and eventually incorporated into the Copyright Act of 1976, which provides that "the fair use of a copyrighted work . . . is not an infringement of copyright."[4]

What is most curious about this doctrine is that neither the decisions that have applied it for nearly 300 years, nor its eventual statutory formulation, undertook to define or explain its contours or objectives. In *Folsom v. Marsh*,[5] in 1841, Justice Story articulated an often-cited summary of how to approach a question of fair use: "In short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[6] The 1976 Copyright Act largely adopted his summary.[7] These formulations, however, furnish little guidance on how to recognize fair use. The statute, for example, directs us to examine the "purpose and character" of the secondary use as well as "the nature of the copyrighted work." Beyond stating a preference for the critical, educational, and nonprofit over the commercial, the statute tells little about what to look for in the "purpose and character" of the secondary use. It gives no clues at all regarding the significance of "the nature of" the copyrighted work. Although it instructs us to be concerned with the quantity and importance of the materials taken and with the effect of the use on the potential for copyright profits, it provides no guidance for distinguishing between acceptable and excessive levels. Finally, although leaving open the possibility that other factors may bear on the question, the statute identifies none.[8]

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[*] Judge, United States District Court for the Southern District of New York.

[1] *See* Salinger v. Random House, Inc., 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987); New Era Publications Int'l v. Henry Holt & Co., 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989).

[2] Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[3] *See, e.g.*, Gyles v. Wilcox, 26 Eng. Rep. 489, 2 Atk. 141 (1740) (No. 130). *See generally* W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6–17 (1985).

[4] 17 U.S.C. § 107 (1982).

[5] 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

[6] *Id.* at 348.

[7] The statute states

Curiously, judges generally have neither complained of the absence of guidance, nor made substantial efforts to fill the void. Uttering confident conclusions as to whether the particular taking was or was not a fair use, courts have treated the definition of the doctrine as assumed common ground.

The assumption of common ground is mistaken. Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals[9] and divided

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> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1982).

[8] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985).

[9] Five of the recent leading cases were reversed at every stage of review. In Rosemont Enterprises, Inc. v. Random House, Inc., 256 F. Supp. 55 (S.D.N.Y.), *rev'd*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) — the Howard Hughes case — the Second Circuit reversed a district court injunction. In Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984), the court of appeals reversed the district court's finding for the defendant, and was in turn reversed by the Supreme Court. In Harper & Row, Publishers, Inc. v. Nation Enterprises, 557 F. Supp. 1067 (S.D.N.Y.), *modified*, 723 F.2d 195 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985), the district court's damage award was reversed by the court of appeals, which in turn was reversed by the Supreme Court. In Salinger v. Random House, Inc., 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987), and in New Era Publications International v. Henry Holt & Co., 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989), my findings of fair use were rejected on appeal

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courts[10] are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns. Justification is sought in notions of fairness, often more responsive to the concerns of private property than to the objectives of copyright.

Confusion has not been confined to judges. Writers, historians, publishers, and their legal advisers can only guess and pray as to how courts will resolve copyright disputes. After recent opinions of the Second Circuit casting serious doubt on any meaningful applicability of fair use to quotation from previously unpublished letters,[11] publishers are understandably reluctant to pay advance royalties or to undertake commitments for biographical or historical works that call for use of such sources.

The doctrine of fair use need not be so mysterious or dependent on intuitive judgments. Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.

I. The Goals of Copyright

The Supreme Court has often and consistently summarized the objectives of copyright law. The copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. This utilitarian goal is achieved by permitting authors to reap the rewards of their creative efforts.

> [C]opyright is intended to increase and not to impede the harvest of knowledge. . . . The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.
>
> . . . [The Constitution's grant of copyright power to Congress] "is a means by which an important public purpose may be achieved. It

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[10] In its first two encounters with fair use, the Supreme Court split 4–4 and thus failed to resolve anything. *See* Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975); Columbia Broadcasting Sys. v. Loew's, Inc., 356 U.S. 43 (1958). The Court decided *Sony* by a 5–4 majority, *see Sony*, 464 U.S. 417, and *Nation* by a 6–3 majority, *see Nation*, 471 U.S. 539. In *New Era*, the Second Circuit voted 7–5 to deny en banc review to alter the panel's dicta on fair use. Four judges joined in a concurring opinion, *see New Era*, 884 F.2d at 660 (Miner, J., concurring), and four in a dissenting opinion, *see id.* at 661 (Newman, J., dissenting).

[11] *See New Era*, 873 F.2d 576; *Salinger*, 811 F.2d 90.

> is intended to motivate the creative activity of authors and inventors by the provision of a special reward . . . ." "The monopoly created by copyright thus rewards the individual author in order to benefit the public."[12]

The fundamental historic sources amply support the Supreme Court's explanation of the copyright objectives. The copyright clause of the Constitution, for example, evinces the same premises: "The Congress shall have Power . . . : To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[13] Several aspects of the text confirm its utilitarian purpose.[14] First is its express statement of purpose: "To promote the Progress of Science and useful Arts . . . ." By lumping together authors and inventors, writings and discoveries, the text suggests the rough equivalence of those two activities. In the framers' view, authors possessed no better claim than inventors. The clause also clearly implies that the "exclusive right" of authors and inventors "to their respective Writings and Discoveries" exists only by virtue of statutory enactment.[15] Finally, that the right may be conferred only "for limited times" confirms that it was not seen as an absolute or moral right, inherent in natural law. The time limit considered appropriate in those days was relatively brief — a once-renewable fourteen-year term.[16]

A similar utilitarian message is found in the original British copyright statute, the Statute of Anne of 1709.[17] Its caption declares that

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[12] *Nation*, 471 U.S. at 545–46 (citation omitted) (quoting *Sony*, 464 U.S. at 429; and *id.* at 477 (Blackmun, J., dissenting)). In numerous prior decisions, the Supreme Court has explained copyright in similar terms. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."); Mazer v. Stein, 347 U.S. 201, 219 (1954); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

[13] U.S. CONST. art. I, § 8, cl. 8.

[14] In *The Federalist* No. 43, Madison observes: "The utility of [the power conferred by the patent and copyright clause] will scarcely be questioned. . . . The public good fully coincides in both cases with the claims of individuals." THE FEDERALIST No. 43, at 186 (J. Madison) (C. Beard ed. 1959).

[15] "That Congress, in passing the Act of 1790, did not legislate in reference to existing rights, appears clear . . . . Congress, then, by this act, instead of sanctioning an existing right . . . created it." Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661 (1834).

[16] Act of May 31, 1790, 1st Cong., 2d Sess., 1 Stat. 124. *See* LATMAN'S THE COPYRIGHT LAW 6 (W. Patry 6th ed. 1986). The original copyright term was but a tiny fraction of the duration of protection under the new 1976 Act — extending 50 years after death — which, in the case of youthful letters of an octogenarian, could easily exceed 100 years. *See* 17 U.S.C. § 302(a) (1982).

[17] Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

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this is "An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors . . . during the Times therein mentioned."[18] The preamble declares the statute's purpose to be "for the Encouragement of Learned Men to compose and write useful Books."[19] Elaborating the justification, the preamble exhibits a prevalent concern for the financial entitlements of authorship by noting that the practice of pirated publication without the author's consent "too often [causes] the Ruin of [Authors] and their Families."[20]

The copyright law embodies a recognition that creative intellectual activity is vital to the well-being of society. It is a pragmatic measure by which society confers monopoly-exploitation benefits for a limited duration on authors and artists (as it does for inventors), in order to obtain for itself the intellectual and practical enrichment that results from creative endeavors.

If copyright protection is necessary to achieve this goal, then why allow fair use? Notwithstanding the need for monopoly protection of intellectual creators to stimulate creativity and authorship, excessively broad protection would stifle, rather than advance, the objective.

First, all intellectual creative activity is in part derivative. There is no such thing as a wholly original thought or invention. Each advance stands on building blocks fashioned by prior thinkers.[21] Second, important areas of intellectual activity are explicitly referential. Philosophy, criticism, history, and even the natural sciences require continuous reexamination of yesterday's theses.

Monopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process. Three judicially created copyright doctrines have addressed this problem: first, the rule that the copyright does not protect *ideas*, but only the manner of expression;[22] second, the rule that *facts* are not within the copyright protection, notwithstanding the labor expended by the original author in uncovering them;[23] and finally, the fair use doctrine, which protects secondary creativity as a legitimate concern of the copyright.

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[18] *Id.* The duration was the once-renewable fourteen-year term later adopted for the United States in the 1790 enactment. *See supra* text accompanying note 16.

[19] Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[20] *Id.*

[21] *See* Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945). "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if the author had a complete monopoly of everything in his book . . . ." *Id.*

[22] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985); New York Times Co. v. United States, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (L. Hand, J.); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) (L. Hand, J.); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (L. Hand, J.); 17 U.S.C. § 102(b) (1982).

II. The Nature and Contours of Fair Use

The doctrine of fair use limits the scope of the copyright monopoly in furtherance of its utilitarian objective. As Lord Ellenborough explained in an early dictum, "[W]hile I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science."[24] Thus, the introductory language of our statute explains that fair use may be made for generally educational or illuminating purposes "such as criticism, comment, news reporting, teaching . . . scholarship, or research."[25]

Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design. Although no simple definition of fair use can be fashioned, and inevitably disagreement will arise over individual applications, recognition of the function of fair use as integral to copyright's objectives leads to a coherent and useful set of principles. Briefly stated, the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity. One must assess each of the issues that arise in considering a fair use defense in the light of the governing purpose of copyright law.

A. The Statutory Factors

Following Story's articulation, the statute lists four pertinent "factors to be considered" "in determining whether the use made of a work in any particular case is a fair use."[26] They are, in summary, the purpose and character of the use, the nature of the copyrighted work, the quantity and importance of the material used, and the effect of the use upon the potential market or value of the copyrighted work.[27] Each factor directs attention to a different facet of the problem. The factors do not represent a score card that promises victory to the winner of the majority. Rather, they direct courts to examine the issue from every pertinent corner and to ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright.

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[23] *See* Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 974 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

[24] Cary v. Kearsley, 170 Eng. Rep. 679, 681, 4 Esp. 168, 170 (1803).

[25] 17 U.S.C. § 107 (1982).

[26] *Id.*

[27] *See id.*

1. Factor One — The Purpose and Character of the Secondary Use. — Factor One's direction that we "consider[] . . . the purpose and character of the use"[28] raises the question of justification. Does the use fulfill the objective of copyright law to stimulate creativity for public illumination? This question is vitally important to the fair use inquiry, and lies at the heart of the fair user's case. Recent judicial opinions have not sufficiently recognized its importance.

In analyzing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner.

I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.[29] A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects" of the original.[30] If, on the other hand, the secondary use adds value to the original — if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.[31]

Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.

The existence of any identifiable transformative objective does not, however, guarantee success in claiming fair use. The transformative justification must overcome factors favoring the copyright owner. A biographer or critic of a writer may contend that unlimited quotation enriches the portrait or justifies the criticism. The creator of a derivative work based on the original creation of another may claim absolute entitlement because of the transformation. Nonetheless, extensive takings may impinge on creative incentives. And the secondary user's claim under the first factor is weakened to the extent that her takings exceed the asserted justification. The justification will likely be outweighed if the takings are excessive and other factors favor the copyright owner.

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[28] *See id.* § 107(1).

[29] *See* Cary v. Kearsley, 170 Eng. Rep. 679, 681–82, 4 Esp. 168, 170–71 (1802). In Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), the dissenters approved this approach, *see id.* at 480 (Blackmun, J., dissenting), but the majority of the Supreme Court rejected it, *see* 464 U.S. at 448–51.

[30] *See* Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

[31] *But cf.* Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1768–69 (1988) (using the term "transformative" in a somewhat different sense).

The importance of a transformative use was stressed in the early decisions, which often related to abridgements. For example, *Gyles v. Wilcox*[32] in 1740 stated:

> Where books are colourably shortened only, they are undoubtedly infringement within the meaning of the [Statute of Anne] . . . .
>
> But this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, because . . . the invention, learning, and judgment of the [secondary] author is shewn in them . . . .[33]

In the United States in 1841, Justice Story wrote in *Folsom*:

> [N]o one can doubt that a reviewer may fairly cite [quote] largely from the original work, if . . . [its design be] . . . criticism. On the other hand, it is as clear, that if he thus [quotes] the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, [infringement will be found].[34]

Courts must consider the question of fair use for each challenged passage and not merely for the secondary work overall. This detailed inquiry is particularly important in instances of a biographical or historical work that quotes numerous passages from letters, diaries, or published writings of the subject of the study. Simply to appraise the overall character of the challenged work tells little about whether the various quotations of the original author's writings have a fair use purpose or merely supersede. For example, in the recent cases of biographies of Igor Stravinsky[35] and J.D. Salinger,[36] although each biography overall served a useful, educational, and instructive purpose that tended to favor the defendant, some quotations from the writings of Stravinsky and Salinger were not justified by a strong transformative secondary objective. The biographers took dazzling passages of the original writing because they made good reading, not because such quotation was vital to demonstrate an objective of the biographers. These were takings of protected expression without sufficient transformative justification.

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[32] 26 Eng. Rep. 489, 2 Atk. 141 (1740) (No. 130).

[33] *Id.* at 490, 2 Atk. at 143.

[34] 9 F. Cas. at 344–45.

[35] *See* Craft v. Kobler, 667 F. Supp. 120 (S.D.N.Y. 1987).

[36] *See* Salinger v. Random House, Inc., 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

I confess to some error in Salinger's case. Although the majority of the biographer's takings were of unprotected facts or ideas and some displayed transformative value in sketching the character portrait, other takings of highly expressive material exhibited minimal creative, transformative justification. My finding of fair use was based primarily on the overall instructive character of the biography. I failed to recognize that the nontransformative takings provided a weak basis for claiming the benefits of the doctrine and that, unless attention were focused on the individual passages, a favorable appraisal of the constructive purpose of the overall work could conceal unjustified takings of protected expression. The converse can also be true: a low estimation of the overall merit of the secondary work can lead to a finding for the copyright owner in spite of a well-justified, transformative use of the particular quotation that should justify a favorable finding under the first factor.

Although repentantly agreeing with Judge Newman's finding of infringement in at least some of the challenged passages, I respectfully disagree with his reasoning, which I contend failed to recognize the need for quotation as a tool of accurate historical method. His opinion suggested a far-reaching rule — that unpublished matter is off-limits to the secondary user, regardless of justification. "[Unpublished] works normally enjoy complete protection against copying any protected expression."[37]

The Second Circuit's *New Era* opinion carried this suggestion further.[38] In *New Era*, unlike *Salinger*, various persuasive justifications were proffered as to why quotation was necessary to accomplish the biographer's objective. For example, the biographer sought to support a portrait of his subject as a liar by showing he had lied; as a bigot by showing he had made bigoted pronouncements; as pompous and self-important by quoting self-important statements. The biographer similarly used quotations to show cruelty, paranoia, aggressiveness, scheming.[39] These are points which often cannot be fairly

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[37] *Salinger*, 811 F.2d at 97.

[38] *See* New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989).

[39] *See* New Era Publications Int'l v. Henry Holt & Co., 695 F. Supp. 1493, 1508–19 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989). The district court opinion found approximately twenty categories of justifications under the first factor. Personal qualities of the subject that the biographer sought to demonstrate through quotations included dishonesty, boastfulness, pomposity, pretension, paranoia, snobbery, bigotry, dislike of Asians and of the Orient, cruelty, disloyalty, aggressiveness, vicious scheming tactics, cynicism, and mental derangement. Other uses included the exposition of a false mythology built up around the personage of L. Ron Hubbard, of his self-image as revealed in early diaries, and of his teenage writing style. Some passages were quoted to ensure an accurate rendition of an idea.

Early drafts of this Commentary included samples of these quotations to illustrate the point here argued about fair use justifications under the first factor. I believed that such quotation in a law review article to further the discussion of a disputed point of law would be a fair use demonstrated without quotation. The Second Circuit's majority opinion rejected the pertinence of even considering the necessity of quotation of unpublished matter to communicate such assessments. Citing *Salinger*, it reasserted that "[unpublished] works normally enjoy complete protection."[40]

I believe the *Salinger/New Era* position accords insufficient recognition to the value of accurate quotation as a necessary tool of the historian or journalist. The biographer who quotes his subject is characterized as a parasite or free rider. If he copies "more than minimal amounts . . . he deserves to be enjoined."[41] Nor does this restriction "interfere . . . with the process of . . . history," the *Salinger* opinion insists, because "[t]he *facts* may be reported"[42] without risk of infringement. Can it be seriously disputed that history, biography, and journalism benefit from accurate quotation of source documents, in preference to a rewriting of the facts, always subject to the risk that the historian alters the "facts" in rewriting them?[43]

As to ideas, the analysis is similar. If the secondary writer has legitimate justification to report the original author's idea, whether for criticism or as a part of a portrait of the subject, she is surely permitted to set it forth accurately. Can ideas be correctly reported, discussed, or challenged if the commentator is obliged to express the idea in her own different words? The subject will, of course, reply, "That's not what I said." Such a requirement would sacrifice clarity, much as a requirement that judges, in passing on the applicability of a statute or contract, describe its provisions in their own words rather than quoting it directly.

Reconsideration of the standards declared by the court of appeals in *Salinger* and *New Era* suggests that no such tolerance exists. I have accordingly deleted the illustrative quotations. Interested readers are referred to the district court opinion, which sets forth numerous examples.

[40] *New Era*, 873 F.2d at 583.

[41] *Salinger*, 811 F.2d at 96; *see also New Era*, 873 F.2d at 584.

[42] *Salinger*, 811 F.2d at 100 (emphasis added).

[43] Sometimes, in the permitted exercise of reporting the facts that are set forth in a letter, a historical writer will inevitably use similar (or identical) language, especially if the original conveyed the fact by simple direct assertion. Consider a biographer whose information about her subject comes largely from letters. One such letter reported to an old college friend, "In July I married Lynn Jones, from San Francisco. We have rented a house on the beach in Malibu and spend most of our free time sunbathing." The biographer, seeking to report these facts writes, "We learn from X's letter to a college friend that in July 1952 he married a San Franciscan named Lynn Jones, that they rented a house on the beach in Malibu and spent most of their free time sunbathing." (This example parallels many instances raised by *Salinger*.) Is this infringement? Notwithstanding virtually identical language, I contend it is not. Where the secondary writer's purpose is to report the facts revealed in the original, and not to appropriate the personal expressive style of the original, she is surely not required — as the Second Circuit's *Salinger* opinion seems to suggest, *see Salinger*, 811 F.2d at 96–97 — to seek refuge in altered language merely to avoid using the same words as the original. Where a simple direct statement of the facts calls for use of the original language, the need to report the fact justifies such use.

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Is it not clear, furthermore, as Chief Judge Oakes' separate opinion in *New Era* recognized,[44] that at times the subject's very words are the facts calling for comment? If a newspaper wishes to report that last year a political candidate wrote a personal letter demeaning a race or religion, or proclaiming ideals directly contrary to those now stated in his campaign speeches, how can it fairly do this without quotation from the letter? If a biographer wished to show that her subject was cruel, jealous, vain, or crazy, can we seriously contend she should be limited to giving the reader those adjectives, while withholding the words that support the conclusion? How then may the reader judge whether to accept the biographer's characterization?

The problem was amusingly illustrated in the fall-out of *Salinger*. After the decision, the biographer rewrote his book, this time without quotations. Resorting to adjectives, he described certain of Salinger's youthful letters as "self-promoting . . . boastful"[45] and "buzzing with self-admiration."[46] A reviewer, who had access to the letters, disagreed and proclaimed that the letters were in fact "exuberant, self-deprecating and charged with hope."[47] Where does that leave the reader? What should the reader believe? Does this battle of adjectives serve knowledge and the progress of the arts better than allowing readers to judge for themselves by reading revelatory extracts?

The Second Circuit appears divided over these propositions. After the split vote of the original *New Era* panel, rehearing en banc was narrowly defeated by a vote of 7–5.[48] Judge Newman, joined by three colleagues, argued that rehearing en banc was warranted "to avoid misunderstanding on the part of authors and publishers . . . — misunderstanding that risks deterring them from entirely lawful writings in the fields of scholarly research, biography, and journalism."[49] His opinion recognized that "even as to unpublished writings, the doctrine of fair use permits some modest copying of an author's expression . . . where . . . necessary fairly and accurately to report a fact set forth in the author's writings."[50] In this discussion, Judge Newman retreated substantially from his position expressed in *Salinger* of normally complete protection.[51]

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[44] *See New Era*, 873 F.2d at 592 (Oakes, C.J., concurring).

[45] I. HAMILTON, IN SEARCH OF J.D. SALINGER 53 (1988).

[46] *Id.* at 56.

[47] Richler, *Rises at Dawn, Writes, Then Retires*, N.Y. Times, June 5, 1988, (Book Review) § 7, at 7.

[48] *See* New Era Publications Int'l v. Henry Holt & Co., 884 F.2d 659, 662 (2d Cir. 1989) (Newman, J., dissenting).

[49] *Id.*

[50] *Id.*

[51] In an illuminating article to be published in the next edition of the *Journal of the Copyright Society*, see Newman, *Not the End of History: The Second Circuit Struggles with Fair Use*, 37 J. COPYRIGHT SOC'Y 1 (1990), Judge Newman substantially clarifies the issue. He now

Quoting is not necessarily stealing. Quotation can be vital to the fulfillment of the public-enriching goals of copyright law. The first fair use factor calls for a careful evaluation whether the particular quotation is of the transformative type that advances knowledge and the progress of the arts or whether it merely repackages, free riding on another's creations. If a quotation of copyrighted matter reveals no transformative purpose, fair use should perhaps be rejected without further inquiry into the other factors.[52] Factor One is the soul of fair use. A finding of justification under this factor seems indispensable to a fair use defense.[53] The strength of that justification must be weighed against the remaining factors, which focus on the incentives and entitlements of the copyright owner.

2. *Factor Two — The Nature of the Copyrighted Work.* — The nature of the copyrighted work is a factor that has been only superficially discussed and little understood. Like the third and fourth factors, it concerns itself with protecting the incentives of authorship. It implies that certain types of copyrighted material are more amenable to fair use than others.

Copyright protection is available to very disparate categories of writings. If it be of original authorship, *i.e.*, not copied from someone else, and recorded in a fixed medium, it is protected by the copyright.[54] Thus, the great American novel, a report prepared as a duty of employment, a shopping list, or a loanshark's note on a debtor's

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espouses the propriety of such quotation in limited quantity when necessary to demonstrate facts. After my changes of position and his, the gulf between us in *Salinger* has significantly narrowed. *See infra* note 119 and accompanying text.

[52] Nonetheless, every trivial taking of copyrighted material that fails to demonstrate a compelling justification is not necessarily an infringement. Because copyright is a pragmatic doctrine concerned ultimately with public benefit, under the de minimis rule negligible takings will not support a cause of action. The justifications of the de minimis exemption, however, are quite different from those sanctioning fair use. They should not be confused. *See, e.g.*, Funkhouser v. Loew's, Inc., 208 F.2d 185 (8th Cir. 1953), *cert. denied*, 348 U.S. 843 (1954); Said v. Newsweek Magazine, 503 F. Supp. 146, 148 (D.D.C. 1980); McMahon v. Prentice-Hall, Inc., 486 F. Supp. 1296, 1303 (E.D. Mo. 1980); Greenbie v. Noble, 151 F. Supp. 45, 70 (S.D.N.Y. 1957); Rokeach v. Avco Embassy Pictures Corp., 197 U.S.P.Q. (BNA) 155 (S.D.N.Y. 1978).

[53] The interpretation of the first factor is complicated by the mention in the statute of a distinction based on "whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1) (1982). One should not exaggerate the importance of this distinction. It is not suggested in any responsible opinion or commentary that by reason of this clause all educational uses are permitted while profitmaking uses are not. Surely the statute does not imply that a university press may pirate whatever texts it chooses. Nor can it mean that books produced by a commercial publisher are excluded from eligibility for fair use. A historian is not barred from making fair use merely because she will receive royalty compensation. This clause, therefore, does not establish a clear distinction between permitted and forbidden users. Perhaps at the extremes of commercialism, such as advertising, the statute provides little tolerance for claims of fair use.

[54] *See* 17 U.S.C. § 102(a) (1982).

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door saying "Pay me by Friday or I'll break your goddamn arms" are all protected by the copyright.[55]

In the early history of copyright, British courts debated whether letters written for private communication should receive any protection at all from the Statute of Anne.[56] The question was soon satisfactorily settled in favor of protection, and I do not seek to reopen it. I do not argue that writings prepared for private motives should be denied copyright protection. In the unlikely event of the publication of the Collected Shopping Lists (or Extortion Notes) of a Renowned Personage, of course only the author should enjoy the author's rights. When it comes to making fair use, however, there is a meaningful difference between writings conceived as artistic or instructive creation, made in contemplation of publication, and documents written for a private purpose, as a message or memo, never intended for publication. One is at the heart of the purpose of copyright — the stimulation of creative endeavor for the public edification. The others are, at best, incidental beneficiaries. Thus, the second factor should favor the original creator more heavily in the case of a work (including superseded drafts) created for publication, than in the case of a document written for reasons having nothing to do with the objectives of copyright law.

The statutory articulation of this factor derives from Justice Story's mention in *Folsom* of the "value of the materials used."[57] Justice Story's word choice is more communicative than our statute's "nature of," as it suggests that some protected matter is more "valued" under copyright law than others. This should not be seen as an invitation to judges to pass on literary quality, but rather to consider whether the protected writing is of the creative or instructive type that the copyright laws value and seek to foster.

The *Nation*, *Salinger*, and *New Era* opinions discussed the second factor solely in terms of whether the copyrighted work was published or unpublished. The *Nation* opinion observed that the unpublished status of a copyrighted work is a critical element of its nature and a

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[55] The latter examples of writing are not ordinarily considered "work," the term used in Factor Two.

[56] Although Pope v. Curl, 26 Eng. Rep. 608, 2 Atk. 342 (1741), answered in the affirmative soon after the passage of the Statute of Anne, Perceval v. Phipps, 35 Eng. Rep. 225, 2 Ves. & Bea. 19 (1813), suggested the contrary.

> [T]hough the Form of familiar Letters might not prevent their approaching the Character of a literary Work, every private Letter, upon any Subject, to any Person, is not to be described as a literary Work, to be protected upon the Principle of Copyright. The ordinary Use of Correspondence by Letters is to carry on the Intercourse of Life between Persons at a Distance from each other, in the Prosecution of Commercial, or other, Business; which it would be very extraordinary to describe as a literary Work, in which the Writers have a Copyright.

Id. at 229, 2 Ves. & Bea. at 28.

[57] Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

"factor tending to negate the defense of fair use";[58] "the scope of fair use is narrower with respect to unpublished works."[59]

The Second Circuit in *Salinger* and *New Era* extended this principle. As interpreted in *Salinger*, the Supreme Court's discussion "conveys the idea that [unpublished] works normally enjoy complete protection against copying any protected expression."[60] However extreme this formulation may be, the word "normally" suggests that in the unusual instance fair use may be made of unpublished matter. *New Era*, however, rejected fair use even when necessary for accurate presentation of a fact; the court thus created an apparently insurmountable obstacle to the fair use of unpublished matter. Under the *Salinger/New Era* view, the unpublished nature of a quoted document trumps all other considerations.

The Supreme Court and the Second Circuit justify these positions by the original author's interest in controlling the circumstances of the first public revelation of his work[61] and his right, if he so chooses, not to publish at all.[62] These are indeed legitimate concerns of copyright law. An author who prefers not to publish a work, or wishes to make aesthetic choices about its first public revelation, will generally have the legal right to enforce these wishes.[63] Due recognition of these rights, however, in no way implies an absolute power to bar all quotation, regardless of how persuasive the justification.

A ban on fair use of unpublished documents establishes a new despotic potentate in the politics of intellectual life — the "widow censor." A historian who wishes to quote personal papers of deceased public figures now must satisfy heirs and executors for fifty years after the subject's death. When writers ask permission, the answer will be, "Show me what you write. Then we'll talk about permission." If the manuscript does not exude pure admiration, permission will be denied.[64]

The second factor should not turn solely, nor even primarily, on the published/unpublished dichotomy. At issue is the advancement of the utilitarian goal of copyright — to stimulate authorship for the public edification. Inquiry into the "nature" or "value" of the copyrighted work therefore determines whether the work is the type of material that copyright was designed to stimulate, and whether the secondary use proposed would interfere significantly with the original author's entitlements. Notwithstanding that nearly all writings may benefit from copyright, its central concern is for the protection of material conceived with a view to publication, not of private memos and confidential communications that its authors do not intend to share with the public.[65] The law was not designed to encourage shoppers to make written shopping lists, executives to keep orderly appointment calendars, or lovers to write love letters. Certainly it was not to encourage the writing of extortion notes. To conclude that documents created for purposes outside the concerns of copyright law should receive more vigorous protection than the writings that copyright law was conceived to protect is bizarre and contradictory. To suggest that simply because a written document is unpublished, fair use of that document is forbidden, or even disfavored, has no logical support in the framework of copyright law.

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[58] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985).

[59] *Id.* at 551.

[60] Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

[61] *See Nation*, 471 U.S. at 552-55.

[62] *See id.* at 559.

[63] *See id.* at 552; 17 U.S.C. § 106(3) (1982).

[64] Counsel to a major publisher advised me that the majority of nonfiction books in publication today present legal problems that did not exist prior to the *Salinger* opinion. Telephone conversation with Harriette Dorsen, counsel of Bantam-Doubleday-Dell Publishing (Dec. 1989); *see also* Kaplan, *The End of History?*, NEWSWEEK, Dec. 25, 1989, at 80 (discussing the hesitancy of publishers to publish books quoting from unpublished sources).

I do not argue that a writer of private documents has no legal entitlement to privacy.[66] He may well have such an entitlement. The law of privacy, however, and not the law of copyright supplies such protection. Placing all unpublished private papers under lock and key, immune from any fair use, for periods of fifty to one hundred years, conflicts with the purposes of the copyright clause. Such a rule would use copyright to further secrecy and concealment instead of public illumination.[67]

I do not dispute that publication can be important in assessing the second factor. Publication for public edification is, after all, a central concern of copyright. Thus, a work intended for publication is a favored protectee of the copyright.[68] A secondary use that imperils the eventual publication of a creation en route undermines the copyright objective. I therefore agree with the Supreme Court, on the particular facts of the *Nation* case, that the nature of the copyrighted work strongly favored its protection — but not merely because it was unpublished. In that case, the *Nation*, a weekly magazine of news and comment, published purloined extracts from the memoirs of former President Gerald Ford, shortly prior to the scheduled appearance of the first authorized serialization in *Time Magazine*.[69] *Time* then cancelled its plan to print the memoir and withheld payment of the balance of the license fee.[70] The Supreme Court rejected the *Nation*'s claim that the newsworthiness of the President's memoir justified a finding of fair use.[71]

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[65] *See supra* pp. 1108–10.

[66] *See infra* pp. 1129–30.

[67] Professor Weinreb argues it is "counterintuitive" that matter intended to be kept private should be more subject to exposure than what was created for others to see. *See* Weinreb, *Fair's Fair*, 103 HARV. L. REV. 1137, 1145–46 (1990). Indeed, it is. For this reason, one who wishes to keep private matters secret possesses various legal remedies, including civil and criminal actions for trespass and conversion, as well as an action to enforce the right of privacy.

My observations here in no way suggest that courts should deprive a person seeking privacy of legal remedies designed to protect privacy. My concern is solely with the understanding of the copyright law -- a body of law conceived to encourage publication for the public edification. Construing its rules as more solicitous of an intention to conceal than to publish contravenes its purposes. *See infra* pp. 1129–30.

[68] It was an anomaly of the original *drafting* that the literal terms of the Statute of Anne provided no pre-publication protection. It measured the limited period of protection as fourteen years running not from the time of authorship but from the date of publication. This problematic drafting formulation no doubt resulted from the fact that the antecedents of the Statute of Anne

The critical element was that President Ford's memoir was written for publication, and was on its way to publication at the time of the *Nation*'s gun-jumping scoop. The Supreme Court emphasized that the *Nation*'s scoop unreasonably diminished the rewards of authorship.[72] The Court noted further that if the practice were tolerated on the grounds of newsworthiness, it would discourage public figures from writing and publishing valuable memoirs.[73] Read in context rather than excerpting isolated phrases, the *Nation* decision communicates a concern for protection of unpublished works *that were created for publication*, or *on their way to publication*, and not for unpublished matter created for private ends and held in secrecy.

It is not always easy to draw the distinction between works created for publication and notations or communications intended as private. A diary, memoir, or letter can be both — private in the first instance, but written in contemplation of possible eventual publication. In a sense, professional authors are writing either directly or indirectly for publication in their private memos and letters, as well as in their manuscripts. In private letters and notebooks, they practice the writ-

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were acts that conferred monopoly *printing* franchises upon printers under royal license. *See* B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 3–9 (1967); LATMAN'S THE COPYRIGHT LAW, *supra* note 16, at 1–4.

Construing the statute in accordance with its literal terms would have left authors unprotected at the time of their greatest exposure to piracy — the time before the act of publication made public the author's entitlement to protection. Thus, an author who showed an unpublished manuscript to a friend, critic, or prospective publisher would have had no protection had the latter pirated the work and published it without authorisation. The British courts, however, cured the problem by construing the Statute to confer protection prior to publication. *See* Pope v. Curl, 26 Eng. Rep. 608, 2 Atk. 342 (1741).

[69] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 543 (1985).

[70] *See id.*

[71] *See id.* at 569.

[72] *See id.* at 554–55.

[73] *See id.* at 557.

er's craft, trying out ideas, images, metaphors, cadences, which may eventually be incorporated into published work.[74]

The attempt to distinguish, for purposes of the second fair use factor, between work created for publication and other written matter should recognize that the copyright objectives include a reasonable solicitude for the ability of the author to practice the craft in the privacy of the laboratory. A critique of an author's writing based solely on rough drafts that the author had superseded might well be an unreasonable intrusion.[75]

On the other hand, notwithstanding the highly protected status of a draft, the privacy of the laboratory should yield in some situations. Assume the following hypothetical cases:

> (1) An author's first novel is greeted with critical acclaim for its elegant style and masterful command of the language. A skeptical critic undertakes to show that the author is a literary fraud, the creation of a talented and unscrupulous editor. In support, the critic quotes brief excerpts from the author's very different original manuscript, revealing a grammatical ignorance and stylistic awkwardness she contends could not conceivably have come from the same pen as the elegant published version. The author sues to enjoin publication of the review.
>
> (2) Author *A* publicly accuses Author *B* of plagiarism; *A* claims that *B*'s recently published book steals a metaphor from a letter *A* wrote to *B*. *B* denies the charge and asserts that his first draft, written before he received *A*'s letter, included the same language. The critic quotes from *B*'s first draft, disproving *B*'s defense by showing that the metaphor was not yet present.

Both examples seem convincing cases of fair use, in which the critic's productive and transformative justification would take precedence over the author's interest in maintaining the privacy of the unpublished draft.[76]

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[74] A recent *New Yorker* cartoon by David Jacobson imagines James Joyce's to-do list posted on his refrigerator. It reads:

TO DO:
1. Call Bank.
2. Dry Cleaner.
3. Forge in the smithy of my soul the uncreated conscience of my race.
4. Call Mom.

NEW YORKER, Sept. 25, 1989, at 100.

[75] Professor Fisher suggests a per se rule barring fair use of material that the original author considered unfinished, on the grounds of injury to the creative process resulting from premature divulgence and absence of benefit. His discussion assumes, however, that the original author's work was created, and is destined, for publication. His reasoning does not apply to a biographer's quotation of an unfinished and abandoned love letter, an extortion demand, or a shopping list. *See* Fisher, *supra* note 31, at 1780.

[76] I therefore question the validity of Chief Judge Oakes' interpretation of *Salinger* in his

In summary, several principles emerge from considering the second factor in light of the copyright objectives: this factor concerns the protection of the reasonable expectations of one who engages in the kinds of creation/authorship that the copyright seeks to encourage. Thus, a text, including drafts, created for publication, or on its way to publication, presents a far stronger case for protection against fair use than matter written exclusively for private purposes. The more the copyrighted matter is at the center of the protected concerns of the copyright law, the more the other factors, including justification, must favor the secondary user in order to earn a fair use finding. The fact that a document is unpublished should be of small relevance unless it was created for or is on its way to publication.[77] If, on the other hand, the writing is on its way to publication, and premature secondary use would interfere significantly with the author's incentives, its as yet unpublished status may argue powerfully against fair use. Finally, this factor is but one of four — it is not a sufficient basis for ruling out fair use. There is no logical basis for making it determinative, as was effectively done in *Salinger* and *New Era*. Although the second factor implies a characterization of the protected work on a scale of copyright-protected values, no category of copyrighted material is either immune from use or completely without protection. Wholesale appropriation of the expressive language of a letter, without a transformative justification, should not qualify as fair use, even though the writer of the letter had never considered publication. On the other hand, if a sufficient justification exists, and the quotations do not cause significant injury to the author's entitlements, courts may allow even quotations from an unpublished draft of a novel.

3. Factor Three — Amount and Substantiality. — The third statutory factor instructs us to assess "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[78] In general, the larger the volume (or the greater the importance) of what is taken, the greater the affront to the interests of the copyright owner, and the less likely that a taking will qualify as a fair use.

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opinion in *New Era*: "quotation used merely to demonstrate writing style may not qualify for the fair use defense." New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 592 (2d Cir. 1989) (Oakes, C.J., concurring).

[77] William Patry has expressed readiness, based on these arguments, to amend his previous positions as outlined in THE FAIR USE PRIVILEGE IN COPYRIGHT LAW, cited above in note 3.

> [He] confesses to mechanically reciting the adage "there is no fair use of unpublished works," thereby failing to adequately take into account the different types of unpublished works and uses thereof . . . [as well as to] mechanically recit[ing that] "harm is presumed when a prima facie case of infringement has been made out" thereby inviting . . . confusion between substantive law and remedy . . . .

Editor's Note, 36 J. COPYRIGHT SOC'Y, note 3 (Apr. 1989).

[78] 17 U.S.C. § 107(3) (1982).

This factor has further significance in its bearing on two other factors. It plays a role in consideration of justification under the first factor (the purpose and character of the secondary use); and it can assist in the assessment of the likely impact on the market for the copyrighted work under the fourth factor (the effect on the market).

As to the first factor, an important inquiry is whether the selection and quantity of the material taken are reasonable in relation to the purported justification. A solid transformative justification may exist for taking a few sentences that would not, however, justify a taking of larger quantities of material.

In its relation to the market impact factor, the *qualitative* aspect of the third test — "substantiality" — may be more important than the quantitative. In the case of President Ford's memoir, a taking of no more than 400 words constituting "'the heart of the book'"[79] caused cancellation of the first serialization contract — a serious impairment to the market for the book. As to the relationship of *quantity* to the market, presumptively, of course, the more taken the greater the likely impact on the copyright holder's market, and the more the factor favors the copyright holder. Too mechanical a rule, however, can be dangerously misleading. One can imagine secondary works that quote 100% of the copyrighted work without affecting market potential. Consider, for example, a lengthy critical study analyzing the structure, symbolism and meaning, literary antecedents and influences of a single sonnet. Fragments dispersed throughout the work of criticism may well quote every word of the poem. Such quotation will not displace the market for the poem itself. If there is strong justification and no adverse market impact, even so extensive a taking could be a fair use.

Too rigid a notion of permissible quantity, furthermore, can seriously distort the inquiry for very short memos or communications. If a communication is sufficiently brief, any quotation will necessarily take most or all of it. Consider, for example, the extortion note discussed above.[80] A journalist or historian may have good reason to quote it in full, either for historical accuracy, to show the character of the writer, or to suggest its effect on the recipient. The copyright holder, in seeking to enjoin publication, will argue that the journalist has taken not only the heart but the whole of the protected work. There are three responses, which relate to the first, second, and fourth factors. First, there may be a powerful justification for quotation of the entirety of a short note. Second, because the note was written for private motives and not for publication, quotation will not diminish the inducement to authors to create works for the public benefit. Finally, because the note is most unlikely to be marketed as a work of its author, there is no effect on its market. Courts must then evaluate the significance of the amount and substantiality factor in relation to the copyright objectives; they must consider the justification for the secondary use and the realistic risk of injury to the entitlements of authorship.

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[79] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983)).

[80] *See supra* text accompanying note 55.

4. *Factor Four — Effect on the Market.* — The fourth factor addresses "the effect of the use upon the potential market for the copyrighted work."[81] In the *Nation*, the Supreme Court designated this "the single most important element of fair use."[82] The Court's recognition of the importance of this factor underlines, once again, that the copyright is not a natural right inherent in authorship. If it were, the impact on market values would be irrelevant; any unauthorized taking would be obnoxious. The utilitarian concept underlying the copyright promises authors the opportunity to realize rewards in order to encourage them to create. A secondary use that interferes excessively with an author's incentives subverts the aims of copyright. Hence the importance of the market factor.[83]

Although the market factor is significant, the Supreme Court has somewhat overstated its importance. When the secondary use does substantially interfere with the market for the copyrighted work, as was the case in *Nation*, this factor powerfully opposes a finding of fair use. But the inverse does not follow. The fact that the secondary use does not harm the market for the original gives no assurance that the secondary use is justified.[84] Thus, notwithstanding the importance of the market factor, especially when the market is impaired by the secondary use, it should not overshadow the requirement of justification under the first factor, without which there can be no fair use.

How much market impairment must there be to turn the fourth factor against the secondary user? By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties.[85] Therefore, if an insubstantial loss of revenue turned the fourth factor in favor of the copyright holder, this factor would never weigh in favor of the secondary user.[86] And if we then gave serious deference to the proposition that it is "undoubtedly the single most important element of fair use,"[87] fair use would become defunct. The market impairment should not turn the fourth factor unless it is reasonably substantial.[88] When the injury to the copyright holder's potential market would substantially impair the incentive to create works for publication, the objectives of the copyright law require that this factor weigh heavily against the secondary user.

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[81] 17 U.S.C. § 107(4) (1982).

[82] *Nation*, 471 U.S. at 566.

[83] This reasoning assumes that the author created the copyrighted matter with the hope of generating rewards. It has no bearing on materials written for personal reasons, independent of the hope of commanding a market.

[84] An unjustified taking that enhances the market for the copyrighted work is easy to imagine. If, for example, a film director takes an unknown copyrighted tune for the score of a movie that becomes a hit, the composer may realize a windfall from the aftermarket for his composition. Nonetheless, if the taking is unjustified under the first factor, it should be considered an infringement, regardless of the absence of market impairment.

Because the fourth factor focuses on the "*potential*" market, *see Nation*, 471 U.S. at 568 (emphasis in original), perhaps such a case should be considered an impairment, despite the bonanza. The taking of the tune for the movie forecloses its eligibility for use in another film.

[85] It does not necessarily follow that the fair use doctrine diminishes the revenues of copyright

Not every type of market impairment opposes fair use. An adverse criticism impairs a book's market. A biography may impair the market for books by the subject if it exposes him as a fraud, or satisfies the public's interest in that person. Such market impairments are not relevant to the fair use determination. The fourth factor disfavors a finding of fair use only when the market is impaired because the quoted material serves the consumer as a substitute,[89] or, in Story's words "supersede[s] the use of the original."[90] Only to that extent are the purposes of copyright implicated.

B. Are There Additional Factors?

1. False Factors. — The language of the Act suggests that there may be additional unnamed factors bearing on the question of fair use.[91] The more I have studied the question, the more I have come to conclude that the pertinent factors are those named in the statute. Additional considerations that I and others have looked to are false factors that divert the inquiry from the goals of copyright. They may have bearing on the appropriate remedy, or on the availability of

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holders. If a royalty obligation attached to every secondary use, many would simply forgo use of the primary material in favor of free substitutes.

[86] *Cf.* Fisher, *supra* note 31, at 1671–72.

[87] *Nation*, 471 U.S. at 566.

[88] Although the *Salinger* opinion acknowledged that the biography "would not displace the market for the letters," it counted this factor in the plaintiff's favor because "some impairment of the market seem[ed] likely." Salinger v. Random House, Inc., 811 F.2d 90, 99 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987). This potential impairment, furthermore, resulted not from the copying of Salinger's words but from the readers' mistaken belief, based on the biographer's use of phrases such as "he wrote," "said Salinger," and "Salinger declares," that they had read Salinger's words. *See id.* The *New Era* opinion also awarded this factor to the plaintiff on a speculative assessment of slight market impairment. *See New Era*, 873 F.2d at 583. I believe the criterion requires a more substantial injury. *See* Fisher, *supra* note 31, at 1671–72.

[89] *See Salinger*, 650 F. Supp. at 425.

[90] Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

[91] The statute states that "the factors to be considered shall include" the four factors. *See* 17 U.S.C. § 107 (1982). "The terms 'including' and 'such as' are illustrative and not limitative." *Id.* § 101.

another cause of action to vindicate a wrong, but not on the fair use defense.

(a) Good Faith. — In all areas of law, judges are tempted to rely on findings of good or bad faith to justify a decision. Such reasoning permits us to avoid rewarding morally questionable conduct. It augments our discretionary power. It provides us with an escape from confronting questions that are difficult to understand. The temptation has been particularly strong in dealing with the difficult issue of fair use.[92] This practice is, however, misguided. It produces anomalies that conflict with the goals of copyright and adds to the confusion surrounding the doctrine.

Copyright seeks to maximize the creation and publication of socially useful material. Copyright is not a privilege reserved for the well-behaved. Copyright protection is not withheld from authors who lie, cheat, or steal to obtain their information. If they have stolen information, they may be prosecuted or sued civilly, but this has no bearing on the applicability of the copyright. Copyright is not a reward for goodness but a protection for the profits of activity that is useful to the public education.

The same considerations govern fair use. The inquiry should focus not on the morality of the secondary user, but on whether her *creation* claiming the benefits of the doctrine is of the type that should receive those benefits. This decision is governed by the factors reviewed above — with a primary focus on whether the secondary use is productive and transformative and whether it causes excessive injury to the market for the original. No justification exists for adding a morality test. This is of course not an argument in favor of immorality. It favors only proper recognition of the scope and goals of a body of law.

A secondary user, like an original author, may be liable to criminal prosecution, or to suit in tort, if she has stolen information or has committed fraud. Furthermore, if she has infringed upon a copyright, morally reprehensible conduct may influence the remedy, including the availability of both an injunction and additional damages for willfulness.[93]

This false morality factor derives from two misunderstandings of early precedent. The first results from the use of words like "piracy" and the Latin phrase "*animus furandi*" in early decisions. In rejecting the defense of fair use, courts sometimes characterized the offending secondary work as having been written *animo furandi* (with intention of stealing). Although this characterization seemed to imply that fair use requires honest intentions, the courts reasoned in the opposite direction. The decisions did not explore the mental state of the secondary user to determine whether fair use was shown. They examined the secondary text to determine whether it made a productive transformative use or merely restated the original. If they found no productive use justifying the taking, judges adorned the conclusion of infringement with words like piracy or *animus furandi*.[94] The morality of the secondary user's conduct played no role in the decision. The irrelevance of the morality of the secondary user's conduct was underlined in decisions like *Folsom v. Marsh*.[95] There Justice Story emphasized not only the good faith and "meritorious labors" of the defendants, but also the usefulness of their work. Finding no "bona fide abridgement"[96] (what I have described as a transformative use), Justice Story nonetheless concluded with "regret" that good faith could not save the secondary work from being "deemed in law a piracy."[97]

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[92] *See* Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968); W. PATRY, *supra* note 3, at 121.

[93] *See* 17 U.S.C. § 504(c)(2) (1982) (providing for additional damages if a willful infringement is found).

A second misleading assumption is that fair use is a creature of equity.[98] From this assumption it would follow that unclean hands and all other equitable considerations are pertinent. Historically this notion is incorrect. Litigation under the Statute of Anne began in the law courts.[99] Although plaintiffs who sought injunctions could sue, and did, in the courts of equity,[100] which exercised parallel jurisdiction, the fair use doctrine did not arise out of equitable considerations. Fair use was a judge-made utilitarian limit on a statutory right. It balances the social benefit of a transformative secondary use against injury to the incentives of authorship.

The temptation to determine fair use by reference to morality also can lead to examination of the conduct and intentions of the plaintiff copyright holder in bringing the suit. The secondary user may contend that the copyright holder is disingenuously invoking copyright remedies as a device to suppress criticism or protect secrecy.[101] Such considerations are also false leads.

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[94] *See, e.g.*, Cary v. Kearsley, 170 Eng. Rep. 679, 4 Esp. 168 (1802); Jarrold v. Houlston, 69 Eng. Rep. 1294, 1298, 3 K. & J. 708, 716–17 (1857); *see also* Marcus v. Rowley, 695 F.2d 1171, 1175 (9th Cir. 1983) ("[F]air use presupposes that the defendant has acted fairly and in good faith . . . ."); Iowa State Univ. Research Found., Inc. v. American Broadcasting Co., 621 F.2d 57, 62 (2d Cir. 1980) (noting the relevance of conduct to fair use).

[95] 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

[96] *Id.* at 349.

[97] *Id.* at 345; *see also* Wihtol v. Crow, 309 F.2d 777, 780 (8th Cir. 1962) (stating that a lack of intent to infringe does not entitle a defendant to the protections of the fair use doctrine); Reed v. Holliday, 19 F. 325, 327 (C.C.W.D. Pa. 1884) ("Intention . . . is . . . of no moment if infringement otherwise appears."); Scott v. Stanford, 3 L.R.-Eq. 718, 723 (1867) (holding that the honest intentions of a defendant are immaterial if the resulting work infringes plaintiff's copyright).

[98] *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984) (applying an "equitable rule of reason"); *see also* S. REP. NO. 473, 94th Cong., 1st Sess. 62 (1975) ("[S]ince the doctrine is an equitable rule of reason, no . . . applicable definition is possible . . . ."); H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65 (1976).

[99] *See* W. PATRY, *supra* note 3, at 3–5.

[100] *See, e.g.*, Dodsley v. Kinnersley, 27 Eng. Rep. 270 (1761) (seeking an injunction to prevent further publication of a novel abstract).

Like a proprietor of land or an owner of contract rights, the copyright owner may sue to protect what he owns, regardless of his motivation. His rights, however, extend only to the limits of the copyright. As fair use is not an infringement, he has no power over it. Whether the secondary use is within the protection of the doctrine depends on factors pertinent to the objectives of the copyright law and not on the morality or motives of either the secondary user or the copyright-owning plaintiff.

(b) Artistic Integrity. — There are many who deplore our law's failure to protect artistic integrity. French law enforces the concept of the *droit moral d'artiste*, which covers among other things a right of paternity (the right to be acknowledged as author of the work), the right to preserve a work from mutilation or change, the right to withdraw or modify a work already made public, and the right to determine whether or not a work shall be published.[102]

Those who would adopt similar rules in United States law seek a place for them in the copyright law, which is understandable in view of the absence of other niches. I do not oppose our adoption of such rights for artists. I do, however, oppose converting our copyright law, by a wave of a judicial magic wand, into an American *droit moral*. To do so would generate much unintended mischief. Our copyright law has developed over hundreds of years for a very different purpose and with rules and consequences that are incompatible with the *droit moral*.

As the copyright privilege belongs not only to Ernest Hemingway but to anyone who has drafted an interoffice memo or dunning letter or designed a computer program, it would be preposterous to permit all of them to claim, as an incident to copyright, the right to public acknowledgement of authorship, the right to prevent publication, the right to modify a published work, and to prevent others from altering their work of art. If we wish to create such rights for the protection of artists, we should draft them carefully as a separate body of law, and appropriately define what is an artist and what is a work of art.[103] Those difficult definitions should be far narrower than the range of copyright protection. We ought not simply distort copyright to convey such absolutes.

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[101] *See, e.g.*, Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 311 (2d Cir. 1966) (Lumbard, C.J., concurring), *cert. denied*, 385 U.S. 1009 (1967); New Era Publications Int'l v. Henry Holt & Co., 695 F. Supp. 1493, 1526 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989).

[102] *See* DaSilva, *Droit Moral and the Amoral Copyright*, 28 BULL. COPYRIGHT SOC'Y 1, 3–4 (1980). *See generally* Ginsburg, *French Copyright Law: A Comparative Overview*, 36 J. COPYRIGHT SOC'Y 269 (1989).

(c) Privacy. — The occasional attempt to read protection of privacy into the copyright is also mistaken.[104] This trend derives primarily from an aberrational British case of the mid-nineteenth century in which there had been no replication of copyrighted material.

Queen Victoria and Prince Albert had made etchings which were exhibited privately to friends. The defendant Strange, a publisher, obtained copies surreptitiously. Strange wrote descriptions of the etchings and sought to publish his descriptions. Prince Albert brought suit to enjoin this intolerable intrusion. The Lord Chancellor, expressing concern for the privacy of the royal family and disapproval of the surreptitious manner by which the defendant had obtained copies of the etchings, affirmed the grant of an injunction.[105]

Prince Albert's case is noteworthy as the seed from which grew the American right of privacy, after fertilization by Brandeis and Warren.[106] But it should not be considered a meaningful precedent for our copyright law. The decision reflects circumstances that distinguish British law from ours — particularly the absence from British law of two of our doctrines. First, although British society placed a higher value on privacy than we do, English law did not have a right of privacy.[107] In this country, a right to privacy has explicitly developed to shield private facts from intrusion by publication.[108] Second,

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[103] *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (to be codified in scattered sections of 17 U.S.C.).

[104] *See, e.g.*, Newman, *Copyright Law and the Protection of Privacy*, 12 COLUM.-VLA J.L. & ARTS 459 (1988).

[105] *See* Prince Albert v. Strange, 41 Eng. Rep. 1171, 1171–72, 1178–79, 1180, 1 Mac. & G. 25, 25–27, 40, 44–45, 48 (1849), *aff'g* 64 Eng. Rep. 293, 2 DeG. & Sm. 652 (1849).

[106] *See* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[107] *See generally* REPORT OF THE COMMITTEE ON PRIVACY, Command Papers 5, No. 5012, at 5–12, 202–07 (1972) (recommending against the creation of a statutory general right of privacy).

[108] The RESTATEMENT (SECOND) OF TORTS § 652A (1977) formulates a cause of action for invasion of privacy, which may arise from unwarranted publication of private facts. Numerous states recognize such a privacy action. Relief is typically available if the publicized matter would be highly offensive to a reasonable person and if no strong public interest exists in the disclosure of the facts. *See, e.g.*, Reed v. Real Detective Publishing Co., 63 Ariz. 294, 304–05, 162 P.2d 133, 138 (1945); Goodrich v. Waterbury Republican-Am., Inc., 188 Conn. 107, 128, 448 A.2d 1317, 1329 (1982); Florida Publishing Co. v. Fletcher, 340 So. 2d 914, 919 (Fla. 1976) (Sundberg, J., dissenting) (discussing the absence of an invasion of privacy action when publishing matters of legitimate public interest), *cert. denied*, 431 U.S. 930 (1977); Midwest Glass Co. v. Stanford Dev. Co., 34 Ill. App. 3d 130, 133, 339 N.E.2d 274, 277 (1975); Beaumont v. Brown, 401 Mich. 80, 96, 257 N.W.2d 522, 527 (1977) (discussing invasion of privacy based on public disclosure of embarrassing private facts); Deaton v. Delta Democrat Publishing Co., 326 So. 2d 471 (Miss. 1976) (holding that plaintiff alleged facts sufficient to establish an invasion of

British law did not include a strong commitment to the protection of free speech.[109] American law, in contrast, maintains a powerful constitutional policy that sharply disfavors muzzling speech.

Serious distortions will occur if we permit our copyright law to be twisted into the service of privacy interests. First, it will destroy the delicate balance of interests achieved under our privacy law. For example, the judgment that, in the public interest, the privacy right should terminate at death would be overcome by the additional fifty years tacked onto copyright protection. Such a change would destroy the policy judgment developed under privacy law denying its benefits to persons who have successfully sought public attention. In addition, as a result of the preemption provisions of the federal copyright statute,[110] construing the copyright law to encompass privacy might nullify state privacy laws.

Moreover, the copyright law is grotesquely inappropriate to protect privacy and obviously was not fashioned to do so. Copyright protects only the expression, not the facts revealed, and thus fails to protect the privacy interest involved.[111] Because the copyright generally cannot be enforced without a *public* filing in the Library of Congress, the very act required to preserve privacy would ensure its violation. Finally, incorporating privacy concerns into copyright would burden us with a bewilderingly schizophrenic body of law that would simultaneously seek to reveal and to conceal. Privacy and concealment are antithetical to the utilitarian goals of copyright.

C. *Injunction*

One of the most unfortunate tendencies in the law surrounding fair use is the notion that rejection of a fair use defense necessarily

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privacy claim); Sofka v. Thal, 662 S.W.2d 502, 510 (Mo. 1983); Commonwealth v. Hayes, 489 Pa. 419, 432–33, 414 A.2d 318, 324–25, *cert. denied*, 449 U.S. 992 (1980); Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 682 (Tex. 1976) (discussing Prosser's categorization of an invasion of privacy action into four distinct torts), *cert. denied*, 430 U.S. 931 (1977); *see also* RESTATEMENT (SECOND) OF TORTS § 652E (1977) (discussing "false light" invasion of privacy). Some commentators have argued for change in the doctrine. *See, e.g.*, Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291 (1983) (arguing for a shift in focus away from the amount of publicity given to private information).

[109] *Cf.* E. BARENDT, FREEDOM OF SPEECH 304–07 (1985) (arguing that British law does not protect freedom of speech as fully as American or German law and recommending the adoption of a "free speech clause" for Britain); Lee, *Bicentennial Bork, Tercentennial* Spycatcher: *Do the British Need a Bill of Rights?*, 49 U. PITT. L. REV. 777, 811–15 (1988) (discussing the Spycatcher incident as having provoked the adoption of a bill of rights to protect free speech more adequately).

[110] *See* 17 U.S.C. § 301 (1982).

[111] *See id.* § 102(b); *see also* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985).

implicates the grant of an injunction. Many commentators have disparaged the overly automatic tendency of courts to grant injunctive relief.[112] The copyright statute and its predecessors express no preference for injunctive relief. The 1976 Act states only that a court "may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."[113] Moreover, the tendency toward the automatic injunction can harm the interests of plaintiff copyright owners, as well as the interests of the public and the secondary user. Courts may instinctively shy away from a justified finding of infringement if they perceive an unjustified injunction as the inevitable consequence.[114]

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[112] Benjamin Kaplan chided courts for "sometimes forget[ting] that an injunction does not go of course; the interest in dissemination of a work may justify a confinement of the remedy to a money recovery." B. KAPLAN, *supra* note 68, at 73. Professor Nimmer, noting judicial authority requiring an injunction, cautions that "where great public injury would be worked by an injunction, the courts might follow cases in other areas of property law, and award damages or a continuing royalty instead of an injunction in such special circumstances." 3 M. NIMMER, THE COPYRIGHT LAW § 14.06[B], at 14-56 (1989). The remedial standard suggested by the *Restatement (Second) of Torts* would allow courts to award a plaintiff damages when countervailing interests, including free speech, disfavor an injunction. *See* RESTATEMENT (SECOND) OF TORTS § 951 comment a (1979); *id.* § 942 comment e; *see also* Abrams, *First Amendment and Copyright*, 35 J. COPYRIGHT SOC'Y 1, 3, 12 (1987) (urging that first amendment values should be viewed as a basis for making copyright law more responsive to the shared values of the nation); Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1030 (1970) (arguing that one way to accommodate copyright property with the public interest in access is to prefer an award of damages to an injunctive remedy); Wishingrad, *First Amendment "Fair Use,"* N.Y.L.J., May 22, 1989, at 2, cols. 3–5 (arguing that courts should select other remedies to avoid infringing the first amendment).

[113] 17 U.S.C. § 502(a) (1982).

[114] An example of such confusion, I confess, may be my own opinion in *Salinger*. With hindsight, I suspect my belief that the book should not be enjoined made me too disposed to find fair use where some of the quotations had little fair use justification.

I believe Professor Weinreb's analysis could similarly deprive copyright owners of their lawful entitlements. Professor Weinreb argues that fair use should not be understood as a part of copyright law, designed exclusively to help achieve its objectives, but as a limitation on copyright based also on other social policies including fairness. It is incorrect, he argues, to restrict fair uses to those that make creative use of the copyrighted material. In some cases, concerns for the public interest will demand that the secondary user's presentation be exempt from the copyright owner's rights, notwithstanding unproductive copying. As an example he cites the finding of fair use involving an unauthorized publication of a copy of a spectator's film of President Kennedy's assassination. *See* Weinreb, *supra* note 67, at 1143 (citing Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968)).

Let us explore Professor Weinreb's example. Assume as our plaintiff a gifted news photographer who, through a combination of diligence, preparedness, rapidity, imagination, instinct, skill, sense of composition, and other undefinable artistic gifts, manages again and again to take captivating photographs of cataclysmic or historic occurrences. According to Professor Weinreb's analysis, the more successful he is in the practice of his creative art, the less copyright protection he has. When there is a sufficiently great public interest in seeing his documentary recordings, he loses his right to receive compensation for them. In the public interest, the newspapers, Legal rhetoric has dulled thought on the injunction remedy. It is a venerable maxim that irreparable injury is "presumed" in a case of copyright infringement.[115] Injunction thus follows as a matter of course upon a finding of infringement. In the vast majority of cases, this remedy is justified because most infringements are simple piracy. Successful fabric designs, fashion accessories, toys, and videos instantly spawn parasitic industries selling cheap copies. These infringers incur no development cost, no advertising expense, and little risk. They free-ride on the copyright owner's publicity, undercut the market, and deprive the copyright owner of the rewards of his creation. Allowing this practice to flourish destroys the incentive to create and thus deprives the public of the benefits copyright was designed to secure. It is easy to justify enjoining such activity. In fact, the presumption of irreparable harm is probably unnecessary. It merely simplifies and reduces the cost of proving what could be shown without a presumption.

Such cases are worlds apart from many of those raising reasonable contentions of fair use. Historians, biographers, critics, scholars, and journalists regularly quote from copyrighted matter to make points essential to their instructive undertakings. Whether their takings will pass the fair use test is difficult to predict. It depends on widely varying perceptions held by different judges. Yet there may be a strong public interest in the publication of the secondary work. And the copyright owner's interest may be adequately protected by an award of damages for whatever infringement is found.

In such cases, should we indulge a presumption of irreparable harm and grant injunctions as a matter of course? According to the *Salinger* opinion, "if [a biographer] copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined . . . ."[116] Judge Miner's majority opinion in *New Era* extended this

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news magazines, and television networks may simply take and republish his photographs without payment. That is fair use.

I think Professor Weinreb's example proves the contrary of his point. He confuses the author's copyright with the questions of remedy. It makes no sense that an "author," whose art and livelihood are to make news photographs that the public will desperately need to see, loses his right to compensation for his labors because he succeeds in his endeavors. On the other hand, the public interest disfavors an injunction barring the dissemination of such a work. The conflict is not difficult to reconcile. The taking of the author's photographs for public display is not fair use; the copyright holder may sue for compensation for the unauthorized republication of his work. The public interest may nevertheless override the right he otherwise would have had to bar distribution. He will be denied an injunction, but will recover damages. Both the copyright law and the public interest will thus be vindicated.

[115] *See* LATMAN'S THE COPYRIGHT LAW, *supra* note 16, at 278 & n.105.

[116] Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

proposition, expressly rejecting the idea that the public interest in publication of an informative biography could outweigh the copyright owner's preference for an injunction.[117] Upon application for rehearing en banc, Judge Newman, author of the *Salinger* opinion but not a part of the *New Era* panel, writing in favor of rehearing of *New Era*, retracted *Salinger's* seminal assertion. Judge Newman explained that his phrase "deserves to be enjoined" had meant nothing more than "deserves to be found liable for infringement."[118] He pointed out that in *Salinger* there had been no dispute over the appropriateness of injunctive relief. Because at the time of the lawsuit the book was in prepublication copy, the infringing passages could be easily excised or altered without destroying the book. Thus there was no good reason to deny the injunction. Judge Newman's *New Era* opinion goes on to argue convincingly that the public interest is always relevant to the decision whether to grant an injunction.[119]

The customary bias in favor of the injunctive remedy in conventional cases of copyright infringement has no proper application to the type of case here discussed. When a court rejects a fair use defense, it should deal with the issue of the appropriate remedy on its merits.[120] The court should grant or deny the injunction *for reasons*, and not simply as a mechanical reflex to a finding of infringement. Plaintiffs should be required to demonstrate irreparable harm and inadequacy of compensation in damages.[121] As Chief Judge Oakes noted in his separate opinion in *New Era*, "Enjoining publication of a book is not to be done lightly. . . . [T]he grant or denial of an injunction remains an open question, to be determined by carefully balancing the appropriate factors."[122]

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[117] *See* New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 584 (2d Cir. 1989).

[118] New Era Publications Int'l v. Henry Holt & Co., 884 F.2d 659, 663 n.1 (2d Cir. 1989) (Newman, J., dissenting) (advocating rehearing en banc).

[119] *See id.* at 664. In his new article, Judge Newman emphasizes the importance of the public interest in determining the availability of an injunction. *See* Newman, *supra* note 51.

[120] *See supra* note 73.

[121] The appropriate measure of damages will raise questions because of the vagueness of the statutory standard. 17 U.S.C. § 504(b) grants the copyright owner his "actual damages suffered and any profits of the infringer that are attributable to the infringement." *Id.* He is permitted, however, to elect instead "statutory damages" of $500 to $20,000 per work infringed. If the infringement was "committed willfully," this statutory award may be increased to $100,000. It may be reduced to $200 if infringers in certain narrow categories believed on reasonable grounds that fair use had been made. *See* 17 U.S.C.A. § 504(c) (West Supp. 1989). A court has wide discretion in setting the award.

It is altogether proper for courts to distinguish in fixing damages between bad faith appropriation and a good faith miscalculation of the permissible scope of fair use. Unquestionably in some circumstances damages should be set to punish and deter. In other instances, no punitive content would be appropriate; fairness would rather suggest reasonable compensation for the use of literary property — a kind of compulsory license.

Where a court has found infringement but denied an injunction, a defendant may limit the risk of catastrophic liability for further distribution of the infringing work by counterclaiming for a declaratory judgment fixing the measure of damages.

As with other issues arising in connection with a fair use defense, analysis of this issue should reflect the underlying goals of the copyright law to stimulate the creation and publication of edifying matter. In considering whether the plaintiff would suffer irreparable harm, the court should focus on harm to the plaintiff's interest as *copyright owner*. A public figure may suffer irreparable injury to his reputation if publication of extracts from his private papers reveals him to be dishonest, cruel, or greedy. An individual suffers irreparable harm by the revelation of facts he would prefer to keep secret. But those are not the types of harms against which the copyright law protects; despite irreparability, they should not justify an injunction based on copyright infringement. Only injuries to the interest in authorship are the copyright's legitimate concern.

Critics of these views express concern that obstacles to injunctive relief may undermine the incentives of authorship for which copyright law was created. If the grant or denial of injunction is informed by the concerns of copyright law, such a worry will prove groundless. If the infringement is of a type likely to diminish creative incentives, the court should favor an injunction. In a case like the *Nation*, where the infringement deprives the author of significant monetary and nonmonetary rewards of authorship, and where, as the Supreme Court found, such infringement diminishes the incentive to public figures to write valuable memoirs, an injunction would be justified. If, on the other hand, the original document had been created for purely private purposes and not as a work of authorship for the public benefit, denial of an injunction would not adversely affect creative incentives. For reasons similar to those discussed under the second factor, courts should more readily grant an injunction where the original is a work of authorship created with a view to publication (or is on its way to publication) than in the case of private communicative documents created for reasons that are not the concerns of copyright law.[123]

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[122] *New Era*, 873 F.2d at 596 (Oakes, C.J., concurring).

[123] Furthermore, although the change of approach to remedy suggested here may sound substantial, I believe based on my experience adjudicating copyright cases in federal court that it would have no significant statistical effect on the grant of injunctions. Of the 150–200 copyright cases that have come before me (by random distribution) in 12 years on the bench, the vast majority involved unmistakable copying without claim of fair use and resulted in injunctions; additional cases presented disputes over performance of the terms of licensing agreements; a few involved overambitious claims, where the similarity was attributable to coincidence or to the fact that both the plaintiff and defendant were copying the same conventional model; in some, the similarity related to unprotected elements such as facts, styles, or ideas. None of those cases are affected by the suggested approach to injunctions. Fewer than ten have invol [illegible] fair use. Half of these were in the area of advertising,

BEST COPY AVAILABLE

In my argument against automatically granting injunctive relief, I have deliberately refrained from invoking the support of the first amendment's opposition to prior restraints. I have excluded such arguments not because they are irrelevant but because they are unnecessary and risk importing confusion. Although copyright often results in suppression of speech, its underlying objectives parallel those of the first amendment. "[T]he Framers intended copyright . . . to be the engine of free expression."[124] It "is intended to increase and not to impede the harvest of knowledge";[125] "[t]o promote the Progress of Science and the useful Arts";[126] to encourage "Learned [writers] to compose and write useful Books."[127] It was never intended to serve the goals of secrecy and concealment. Thus, the copyright law on its own terms, and not merely in deference to the first amendment, demands caution in awarding oppressive injunctions.

III. CONCLUSION

A question to consider in conclusion is whether imprecision — the absence of a clear standard — in the fair use doctrine is a strength or a weakness. The case that it is a weakness is easy to make. Writers, publishers, and other would-be fair-users lack a reliable guide on how to govern their conduct. The contrary argument is more abstract. Perhaps the abundance of disagreement reflects the difficulty of the problem. As Justice Story wrote in 1841, it is not easy "to lay down any general principles applicable to all cases."[128] A definite standard would champion predictability at the expense of justification and would stifle intellectual activity to the detriment of the copyright objectives. We should not adopt a bright-line standard unless it were a good one — and we do not have a good one.

We can nonetheless gain a better understanding of fair use and greater consistency and predictability of court decisions by disciplined focus on the utilitarian, public-enriching objectives of copyright — and by resisting the impulse to import extraneous policies. Fair use is not a grudgingly tolerated exception to the copyright owner's rights of private property, but a fundamental policy of the copyright law.

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fair use was rejected and an injunction appropriately granted. Only in three or four cases, or approximately two percent, could differing views conceivably have affected the standard. I can think of only one where my grant or denial of an injunction would turn on whether the traditional or the suggested approach were followed. If my experience is representative, this approach to the injunction remedy would not undermine the incentives that the copyright seeks to foster.

[124] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

[125] *Id.* at 545.

[126] U.S. CONST. art. I, § 8, cl. 8.

[127] Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[128] Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

The stimulation of creative thought and authorship for the benefit of society depends assuredly on the protection of the author's monopoly. But it depends equally on the recognition that the monopoly must have limits. Those limits include the public dedication of facts (notwithstanding the author's efforts in uncovering them); the public dedication of ideas (notwithstanding the author's creation); and the public dedication of the right to make fair use of material covered by the copyright.

APPENDIX 4.—LETTER FROM PENNY A. HAZELTON, PRESIDENT, AMERICAN ASSOCIATION OF LAW LIBRARIES (WITH ATTACHMENT), TO HON. WILLIAM J. HUGHES, JUNE 6, 1991

PRESIDENT
VICE PRESIDENT
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JUN 12

June 6, 1991

The Honorable William J. Hughes, Chair
Subcommittee on Intellectual Property and Judicial Administration
House Judiciary Committee
United States House of Representatives
Cannon Building, Room 341
Washington, DC 20515

Dear Mr. Hughes:

H.R. 2372 was introduced on May 16, 1991. Bills have been introduced on fair use of unpublished materials in past Congresses. The American Association of Law Libraries has followed such legislation closely in the past and has expressed its opinions on prior bills through testimony. A copy of our prior testimony is attached. We believe that our opinions and reasons are as applicable to the current bill as they were to similar bills referenced in our attachment. We are very supportive of the legislation, and we urge the Committee to act favorably on H.R. 2372.

Sincerely,

Penny A. Hazelton

Penny A. Hazelton
President, American Association
of Law Libraries

Enclosure
cc: Sally Wiant
Sally Holterhoff
Kathleen Vanden Heuvel
Robert Oakley

WRITTEN STATEMENT ON BEHALF OF THE
AMERICAN ASSOCIATION OF LAW LIBRARIES
Before the SUBCOMMITTEE ON PATENTS, COPYRIGHTS, & TRADEMARKS OF THE
SENATE COMMITTEE ON THE JUDICIARY
and the
Subcommittee on Courts, Intellectual Property
and the Administration of Justice of the
House Committee of the Judiciary
on
H.R. 4263 and S. 2370
101st Congress, 2nd Session
Wednesday, July 11, 1990

INTRODUCTION

The American Association of Law Libraries (AALL) is a national organization of more than 4,700 professionals who are committed to developing and increasing the usefulness of law libraries and the cultivation of the science of law librarianship. In the Association's legislative policy adopted in 1990, the Association states its belief "that an equitable balance between the rights of users of information and the rights of copyright holders is essential to the free flow of information. The Association urges that all proposed revisions, guidelines, procedures, or interpretations relating to the Copyright Law maintain this balance by interposing a minimum of obstacles to the free and open distribution of ideas in all media and formats." AALL is interested in H.R. 4263 and S.2370 because many of our libraries, particularly those in the academic sector, are repositories for unpublished works, including manuscripts, letters, and other papers. The purpose of these bills is to apply fair use equally to published and unpublished works. Like published materials, the value of these materials in our libraries would decline if researchers did not have the right to copy from these works in situations covered by section 107 of the Copyright Law.

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HISTORICAL FAIR USE

The main thrust of Article 1, Section 8, is to advance public welfare by encouraging the expression and dissemination of creative ideas.

Subject to certain exceptions, copyright legislation gives exclusive rights to the copyright owner. The quoting of reasonable excerpts has long been considered fair use, a judicially created exception to the exclusive rights held by a copyright owner. The rationale for the doctrine and the criteria for its application are discernable from case law. These judicial decisions determine the balance between the public's right of access and the creator's right to benefit from his or her creation.

The 1909 Act was silent on the question of fair use. Until the 1976 Act, there had been no statutory provision dealing with the issue. Under the 1909 Act, unpublished works were protected under the common law of the individual states and authors had property rights in their works. Until general publication of the work, the author had the exclusive right to copy or to authorize copying. Upon publication, copyright protection continued only if the work contained a notice of copyright and was registered with the United States Copyright Office. Reproduction of limited sections of published materials under copyright was subject to the fair use doctrine and other statutory and common law exceptions to the author's exclusive right to copy.

All this has changed with the enactment of the 1976 Act. Now copyright protection is attached the minute the independent work is fixed in any tangible medium of expression. Both published and unpublished works are protected once expressed in a tangible form. Unpublished works created before January 1, 1978 are now protected from unauthorized use until 50 years after the death of the author or at least until December 31, 2002. Congress made a conscious decision to include unpublished works in the 1976 Act. Congress also made a conscious decision to include two important exceptions in the 1976 Act to insure the public's right of access to the wide variety of works now covered by the copyright law: fair use and reproduction by libraries and archives. The fair use exception of the 1976 Act incorporates the judicially created doctrine of fair use - the quotation or paraphrase without the specific permission of limited sections of the document for purposes such as teaching, news reporting, and research.

RECENT COURT DECISIONS ON FAIR USE

Several recent decisions including *Harper & Row, Inc. v. Nation Enters.*, *Salinger v. Random House, Inc.*, and *New Era Publications Int'l. v. Henry Holt & Co.* have emphasized the unpublished nature of the work in their analysis of the fair use doctrine. In 1985, in Harper & Row, the Supreme Court focused attention on the unpublished nature of the copied work by ruling that The Nation had exceeded fair use when it printed excerpts from a purloined copy of as yet unpublished memoirs of Gerald Ford. Even though the 1976 Act eliminates the distinction between published and unpublished works and does not mention publication as one of the factors to be considered under section 107, the Court insisted that a work's published status is one criterion to consider in determining whether use is fair and that use of unpublished works is fair only in extraordinary cases. Four members of the court agreed that there could be virtually no unauthorized use of unpublished materials "even if the work is a matter of . . . high public concern." The court's interpretation narrows the scope of fair use for all unpublished works.

The Second Circuit in Salinger and New Era Publications limited the "fair use" exception as applied to a biographer's use of unpublished materials, holding that the fair use doctrine was virtually inapplicable to unpublished materials. The Salinger decision appears to all but eliminate the fair use exemption even for research purposes where the copied work is unpublished. Salinger arose from a biographer's use of unpublished letters housed in several research libraries. Relying on Harper & Row, the Second Circuit found that the biographer's use of unpublished letters was not a fair use even though the biography clearly fit within several of the fair use purposes specifically mentioned by § 107 and only slightly more than 200 words were directly quoted from the letters. In its discussion of the effect of the unpublished nature of the work on the application of the fair use doctrine, the Salinger opinion makes two statements that place significant limitations on the public's right to access to scholarly research. First, the court states "Salinger's letters are unpublished, and they have not lost that attribute by placement in libraries where access has been explicitly made subject to the observance of at least the protection of the copyright law." 811 F.2d at 97. While it is true that deposit of an unpublished work in a research library does not reduce the amount of copyright protection for a work, the placement of this statement in the opinion seems to imply major restrictions on the use of unpublished works in libraries while § 108 clearly contemplates the copying of unpublished works housed in libraries for purposes of scholarly research. Second, the court's statement that "we think that the tenor of the Court's entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression," 811 F.2d at 97, seems to prohibit all fair use copying from unpublished works. Taken together these two statements imply major restrictions on the use of unpublished works in research libraries that we believe are contrary to the intent of Congress, the public benefit spirit of the Copyright clause of the Constitution, and the best interests of the public. The language in Salinger which prohibits close paraphrasing as equivalent to copying places even more severe restrictions on the use of unpublished works for research purposes.

The Second Circuit reiterated its extremely narrow interpretation of the application of the fair use doctrine to unpublished works in New Era Publications Int'l v. Henry Holt & Co., another biography case in which the court recognized the legitimate purpose of the use.

The Supreme Court's refusal to review either Salinger or New Era now makes it virtually impossible for scholars to practice their craft without running a high risk of having an injunction prevent publication of their works. Authors also are faced with a possibility of monetary damages. These very narrow interpretations of the fair use doctrine stifle the incentive to produce new creative works that the Copyright Law was designed to insure.

Following these decisions, writers and scholars turned to Congress to seek legislative action to correct the chilling affect of these decisions on the creation of new works. As a result of these appeals, H.R. 4263 and S. 2370 have been introduced. Most recently in New Era Publications Int'l v. Carol Publishing Group, the Second Circuit has reaffirmed its interpretation that the unpublished nature of a work precludes most uses that would be fair if the work had been published making the passage of one of these bills even more important.

EFFECT ON LIBRARIES

These decisions place severe limits on the value of important portions of the collections of many research libraries. Since all works created before January 1, 1978 that had not been previously published were granted copyright protection by the 1976 Act until at least the year 2003, and copyright in works created after January 1, 1978 exists until at least the year 2028, all unpublished works now in library collections are covered by copyright. Libraries must presume that every work donated is copyrighted unless it was produced by the federal government. Furthermore, a library cannot presume that the person donating the works to the library owns the copyright in the works nor can a library presume that all rights are transferred even when a donor is the copyright holder. In many cases it may be impossible to track down the heirs of long dead unpublished authors to obtain the release of literary rights. The administrative burdens may prevent some libraries from accepting donations of unpublished materials that contain valuable research material.

If the narrow interpretations in the recent cases concerning unpublished works are allowed to stand, society will lose the benefit of much valuable research. Many of today's scholars would be dead before they could publish their own research which may require the use of quotations or close paraphrasing of unpublished works. Even if the scholars could publish their own research before they died, the delay caused by the inability to quote or paraphrase previously unpublished works could make much of their research out-of-date before it could be communicated to the public.

There is some danger of libraries being exposed to liability for contributory infringement if scholarly use of unpublished material is not considered to be a fair use under the same circumstances as scholarly use of published works.

Those who favor the recent decisions on unpublished works may argue that the prohibition against quotation or close paraphrasing does not reduce the research value of unpublished material because researchers still have the right to use facts from unpublished materials. In the field of law, as in the fields of history, biography, and journalism, accuracy and interpretation of precise wording is critical. In these and other instances, it is important to recognize that accurate recording and analysis justifies the use of direct quotation even where the source may be an unpublished work.

Conclusion

The apparent conflict between recent decisions narrowly interpreting the application of the fair use doctrine to unpublished works and the legislative history of the 1976 Act which clearly indicates Congress' intention to apply the Copyright Law to unpublished works has created confusion and is likely to chill the use of unpublished materials for research purposes. In light of the importance of such materials to research, the American Association of Law Libraries supports an amendment to the Copyright Law to clarify that the fair use doctrine should be applied to published and unpublished works in the same manner. Clarification will benefit legal researchers as well as historians, biographers, journalists and other researchers by permitting the maximum use of unpublished materials. For these reasons, AALL supports H.R. 4263 and S. 2370.

APPENDIX 5.—LETTER FROM SHIRA PERLMUTTER, ASSISTANT PROFESSOR, COLUMBUS SCHOOL OF LAW, THE CATHOLIC UNIVERSITY OF AMERICA, TO HON. WILLIAM J. HUGHES, NOVEMBER 27, 1991

CUA

THE CATHOLIC UNIVERSITY OF AMERICA

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November 27, 1991

Chairman William J. Hughes
Subcommittee on Intellectual Property
  and Judicial Administration
Committee on the Judiciary
House of Representatives
Washington, D.C.

Re: H.R. 2372

Dear Chairman Hughes:

I am writing to supplement the testimony I gave at the June 6, 1991 hearing on H.R. 2372, in light of a recent important development.

At the hearing, I testified that the proposed amendment to the fair use provision of the Copyright Act, Title II of the bill, was neither necessary nor desirable. On Thursday, November 21, the Second Circuit issued a decision affirming one of the district court decisions that I cited as a basis for my opinion, Wright v. Warner Books, Inc., 748 F. Supp. 105 (S.D.N.Y. 1990). The Second Circuit's decision should put to rest any remaining concerns as to that Circuit's law on the issue of fair use of unpublished materials, and remove any need for legislation.

In Wright, a panel of the Second Circuit held that a biographer's use of material from her subject's unpublished letters and journals constituted fair use as a matter of law. Wright v. Warner Books, Inc., No. 90-9054, slip op. (2d Cir. Nov. 21, 1991). Despite resolving the second fair use factor (the nature of the copyrighted work) against the biographer based on the unpublished status of the letters and journal, the court found that the other statutory fair use factors weighed in her favor and entitled her to summary judgment.

In reaching this result, the court explicitly stated that neither Salinger nor any other case had established a per se rule barring fair use of unpublished works, and cautioned that fair use requires a "totality inquiry," based on the weighing of all of the statutory factors. Slip op. at 19-20. The opinion thus accomplishes precisely what the proposed amendment is designed to accomplish: clarifying that fair use may be made of unpublished works, and that courts must consider all of the relevant factors in making the fair use determination for unpublished works as well as published. As the Second Circuit has now corrected the problem it created through unfortunate dicta in its own decisions, there is no longer any need for Congress to clarify the issue.

Those advocating the amendment may nevertheless continue to press for legislation, pointing to the Second Circuit's strong statements in Wright of the importance to the fair use balance of the unpublished status of the plaintiff's work. The court characterized unpublished works as "the favorite sons of factor two," indicating that the second fair use factor would almost always be resolved against the defendant when the work is unpublished. Slip op. at 12-13. This treatment of the published/unpublished distinction, however, derives from equally strong statements in the Supreme Court's decision in Harper & Row, a decision that the bill is not intended to overturn. And any qualms engendered by these statements in Wright should be allayed by the bottom line: a finding of fair use.

Even apart from the "unpublished" issue, Wright is a pro-publisher decision in a number of respects. The opinion is quite favorable to nonfiction authors and publishers in its treatment of the other fair use factors. In particular:

1) The court held that the first fair use factor should be resolved in the defendant's favor without further inquiry if the defendant's work qualifies as one of the illustrative types of uses listed in the first sentence of section 107, such as criticism, scholarship and research. Slip op. at 10. The Court classified the defendant's biography as falling within these categories, and made several positive statements about the social value of biography. Id. at 10 and 20. This is a groundbreaking aspect of the decision, indicating that the for-profit nature of a biography or history will not weigh against a fair use claim.

2) The court rejected the argument that use of plaintiff's material after denial of a request for permission constituted bad faith weighing against fair use. Slip op. at 10-11.

3) The court drew a distinction between the use of expression to illustrate factual points, enhance the biographer's analysis, or establish her credibility, as opposed to its use to enliven the text and rely on the subject's words to "make the book worth reading." It also applied a demanding standard to the question of qualitative similarity. Slip op. at 15-16; 20.

4) The court reaffirmed that the fourth factor is the most important, indicating that a biography or history that, like the defendant's, does not reproduce so much of its subject's unpublished writings as to serve as a substitute in the market is likely to be held a fair use. Slip op. at 17-18; 20.

Indeed, one is hard pressed to imagine a more reassuring opinion from the publisher's perspective. We now know that it is possible to make fair use of unpublished material; that even "enlivening" uses that are reasonable in amount and do not interfere with the potential market for that material are permissible; and that the first factor of the fair use analysis will virtually automatically be resolved in favor of a biographer or historian. While only a small amount of expression was used in Wright,[1] it appears that a more extensive taking could pass muster in a future case; the resolution of the issue on summary judgment leaves room for a finding of fair use of greater amounts on a full factual record.

The only greater assistance that the court of appeals could provide, consistent with Harper & Row, would be the conclusive weight of an en banc opinion. But the panel's decision has the full force of law; almost all appellate cases are decided by panels, as were the original sources of the problem, Salinger and New Era themselves. The law of the Second Circuit is now Harper & Row as interpreted by Salinger and New Era, as glossed by Wright. No lower court or future appellate panel has the power to disregard Wright's teachings, which can only be reversed by the Second Circuit sitting en banc--a result that is highly unlikely, given the announced views of a majority of its sitting judges.[2]

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[1] The Court of Appeals' tally of the amount taken was considerably higher than that of the district court, which had analyzed some of the same material as unprotectible facts. See slip op. at 8-9.

[2] Eight Second Circuit judges (Judges Newman, Oakes, Kearse and Winter in New Era II; Judges Meskill, McLaughlin and Van Graafeiland in Wright; and Judge Walker in his opinion sitting as the district judge in Wright) have now expressed their unwillingness to apply literally the extreme dicta in Salinger and New Era. Judges Altimari and Mahoney have also indicated that the unpublished status of a work does not constitute a bar to a finding of fair use. See Association of American Medical Colleges v. Cuomo, 928 F.2d 519, 523-26 (2d Cir. 1991) (held: fair use defense presented issues of fact despite unpublished status of plaintiff's work, given non-commercial, non-competing nature of use).

After *Wright*, it is difficult to see what purpose the proposed amendment would serve. If the amendment is adopted, courts will still be required under *Harper & Row* to treat the unpublished status of a work as a "key factor" weighing against a finding of fair use, and will still need to engage in a balancing of factors, with the outcome of any particular fair use claim remaining unpredictable.

I therefore respectfully reiterate my recommendation that the proposed legislation not be adopted.

Respectfully submitted,

Shira Perlmutter

Shira Perlmutter
Assistant Professor

APPENDIX 6.—ANNUAL REPORT OF THE ACTIVITIES UNDER THE NATIONAL FILM PRESERVATION ACT OF 1988 FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1989

ANNUAL REPORT OF THE ACTIVITIES UNDER THE NATIONAL FILM PRESERVATION ACT OF 1988 FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1989

The National Film Preservation Act of 1988 (P.L. 100-446) established in the Library of Congress a National Film Registry for the purpose of registering and preserving films that are culturally, historically, or aesthetically significant.

The Act also provided for a National Film Preservation Board to be chosen by the Librarian of Congress from a list of nominations submitted by a number of national associations and institutions. The Board reviews nominations for films selected for the National Film Registry and consults with the Librarian of Congress with respect to their inclusion in the Registry.

The activities of the Library of Congress and the Board carried out under the provisions of the Act for fiscal 1989 are summarized below.

The films selected for inclusion in the National Film Registry for 1989 are:

(1) The Best Years of Our Lives (1946)
(2) Casablanca (1942)
(3) Citizen Kane (1941)
(4) The Crowd (1928)
(5) Dr. Strangelove (or, How I Learned to Stop Worrying and Love the Bomb) (1964)
(6) The General (1927)
(7) Gone with the Wind (1939)
(8) The Grapes of Wrath (1940)
(9) High Noon (1952)
(10) Intolerance (1916)
(11) The Learning Tree (1969)
(12) The Maltese Falcon (1941)
(13) Mr. Smith Goes to Washington (1939)
(14) Modern Times (1936)
(15) Nanook of the North (1922)
(16) On the Waterfront (1954)
(17) The Searchers (1956)
(18) Singin' in the Rain (1952)
(19) Snow White and the Seven Dwarfs (1937)
(20) Some Like It Hot (1959)
(21) Star Wars (1977)
(22) Sunrise (1927)
(23) Sunset Boulevard (1950)
(24) Vertigo (1958)
(25) The Wizard of Oz (1939)

As announced at a press conference held at the Library of Congress on September 19, this list of twenty-five films is not a list of the best twenty-five American films. Rather it suggests to the American public the broad range of great American filmmaking. The release of this list will help to promote film as an art form and will generate public interest in the preservation of film. (See press release Appendix A.)

The films were selected after a long and exhaustive process which began with the nomination by the public of almost 1,000 film titles. The National Film Preservation Board met twice to discuss the film selections, once in January to recommend to the Librarian of Congress criteria for the selection of films and once in July to recommend the first twenty-five film titles. On September 26, 1989 the Board met to discuss the labeling requirements.

Appointments to the National Film Preservation Board were made in accordance with section 8 of the Act (see Appendix B).

Summaries of the meetings of the National Film Preservation Board follow.

Meeting of the National Film Preservation Board
January 23, 1989

The first public meeting of the National Film Preservation Board was held on January 23, 1989 in the Library of Congress and was chaired by Fay Kanin representing the Academy of Motion Picture Arts and Sciences. The Librarian of Congress instructed the Board, prior to their own meeting, that the law required the Board and the Librarian to accomplish jointly four tasks in the first year:

(1) establish criteria for the selection of films into the National Film Registry; (2) establish procedures to engage the general public in the selection process; (3) select twenty-five films for inclusion into the National Film Registry; and (4) issue film labeling guidelines for the films selected for inclusion in the Registry. It was agreed that the Board would take up these items in this order and that at the January meeting the Board would complete only items one and two.

1) In its first agenda item, the Board stated a preference for very broad guidelines:

(a) A "film" is defined as a "feature-length, theatrical motion picture after its first theatrical release." The Board agreed that both "feature-length" and "theatrical release" were to be read very broadly, so as not to exclude certain films. In the case of "feature-length", for example, it was agreed that the term has a different meaning when looked at in an historical context;

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(b) Films selected for the National Film Registry must be "culturally, historically or aesthetically" important. The Board recommended that these terms be construed broadly;

(c) Films should not be considered for inclusion in the Film Registry if no element of the film exists, but no film would be denied inclusion in the Registry because it had already been preserved. The Board said that while it wants to be active in film preservation activities, it would not want to exclude films because they were already preserved; and

(d) No film is eligible for inclusion in the Film Registry until 10 years after its first theatrical release.

After a discussion of whether only "American" films would be eligible for inclusion in the Registry, the Board concluded that any film would be included under the Act so long it had a "theatrical release," and met the criteria set out in the Congressional findings listed in section 1 of the Act. It was agreed to decide on a case-by-case basis whether a film selected for inclusion in the Registry would promote those ends.

2) The Board agreed to invite broad solicitation from the public in order to educate the public about the Board's purposes and engage broad interest in its activities. Therefore, the Board agreed to:

(a) Publish notices of meetings of the National Film Preservation Board in the Federal Register;

(b) Establish a mailing address within the Library of Congress for the public to use to make recommendations to the Film Board;

(c) Prepare materials for Congressional offices to mail out to their own constituents who wish to make recommendations to the Film Board;

(d) Have the Library of Congress send to other libraries, notices, which would be posted, asking the public to participate in nominating films;

(e) Have similar notices mailed to all movie theaters to be posted in theater lobbies; and

(f) Ask Board members to submit the names of other organizations, guilds, unions, and associations which would also be sent notices; and contact film critics and historians for similar participation.

The Board agreed to a schedule for the year setting April 21 as the final date for nominations of films from all sources, including each Board member. Board members agreed to nominate as many as 50 films each (a potential Board list of 650 films), and then to narrow the list by mail ballot to 50 total films by mid-June in preparation for the July meeting.

The Board opened the meeting up to questions from the general public.

Following the January 23 Board meeting, and after further consultation with the Board and Library of Congress staff, the Librarian of Congress issued criteria for the selection of films and proposed guidelines for incorporating the broadest possible public participation in the selection process. These guidelines were printed in the Federal Register on February 13, 1989 soliciting public comment in accordance with the Administrative Procedures Act (Appendix C). They will be promulgated as final guidelines when the labeling guidelines are completed later this year.

Meeting of the National Film Preservation Board
July 19, 1989

After reducing the list of films by mail balloting, the Board met for the second time in Los Angeles on July 19, 1989, to discuss its process for recommending its twenty-five films. At the Board's request, the Librarian of Congress attended this meeting so that he might benefit from their discussion of films in order to facilitate the selection process.

The Board received 962 film titles for nomination from the general public and by mail balloting. They reduced their "working list" for the July meeting to 57 titles. Chairwoman Kanin reminded Board members, however, that any film was eligible for inclusion, whether it was on anyone's list, if it met the qualification requirements.

The Board discussed whether certain genres of film, such as animated features, documentaries, and avant garde/independent films, should be automatically selected for inclusion in the list of twenty-five. It was decided that a "quota" system would not be advisable because there were too many other genre categories, such as westerns, comedy, musicals, film noir etc., that also deserved attention. Rather, the Board agreed to "seriously consider" only two categories -- animated features and documentaries -- but set no absolute quota for films in each of these categories.

After several hours in a public meeting, the Board went into executive session to discuss the list of twenty-five film titles.

The Board discussed the pros and cons of all 57 titles on their "working list" and added some titles to that list during the discussion. The Board agreed that each member would send his/her final nominations by mail balloting to the Librarian of Congress. They also agreed that Board members were not precluded in this mail ballot from naming film titles which were not discussed.

Each Board member submitted to the Library a list of 30 films, numbered 1 to 30 with the number one film valued at 30 points, number 2 at 29 points, and so on. The Board's nominations were tabulated into a single list of 25 films for consideration by the Librarian of Congress. It was the unanimous opinion of the Board that this list should not be made public.

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Mindful of the Board's discussion and its list of films, the Librarian consulted with staff of the Library's Motion Picture, Broadcasting and Recorded Sound Division in order to make his final selections. On September 19, 1989 the Librarian of Congress released a list of twenty-five films to the American public.

Meeting of the National Film Preservation Board
September 26, 1989

The Board met for the third and final time this fiscal year at the Library of Congress, to discuss the labeling guidelines found in section 3 of the Act, "so that film owners and distributors are able to determine whether a version of a film registered on the National Film Registry which is in their possession has been materially altered." Robert Rosen representing the University of California, Los Angeles, chaired the meeting.

The Board's agenda for this meeting included a discussion of specific practices in the industry. The Board's duty in this regard is simply to interpret Congressional intent on the labeling requirements in order to help film owners and distributors. The Board agreed by a 9-3 vote (with one member absent from the vote) on a motion recommending that the Librarian's labeling guidelines require labeling of films in all cases except where a film is edited for "standards and practices" (nudity, language or violence) or for the insertion of commercials or public service announcements. The Board found that given the parameters of the legislation there were irreconcilable differences among the members of the Board on the labeling requirements and the Board's vote was meant to be "advisory" only.

The Board also agreed by acclamation to a motion urging the Librarian to request immediately from Congress an additional $500,000 to $1 million for the archiving and preservation of the twenty-five films selected for the National Film Registry. Although the Library of Congress has 21 of the 25 films in some form, only 2 are of archival quality.

Having the benefit of the Board's discussion at this meeting and after further consultation with the Board, the Librarian will issue final labeling guidelines in accordance with the Administrative Procedures Act to be effective after January 1, 1990.

Nominations for films for inclusion in the National Film Registry for next year's list of twenty-five films are now being solicited. Printed notices soliciting nominations from the public, due April 21, 1990, have been distributed to libraries and movie theaters nationwide.

A seal has been designed by Saul Bass in accordance with section 3(a)(2)(C) of the Act. It will be made available to copyright owners for display on the twenty-five selected films.

Copyright owners of the twenty-five selected films are being contacted to obtain archival quality film for the National Film Board Collection in the Library of Congress.

The Library of Congress, as the repository of the largest film and television collection in the world, and with by far the largest film preservation effort, welcomes the opportunity Congress has given it under the National Film Preservation Act.

APPENDIX 7.—STATEMENT OF JAMES H. BILLINGTON, THE LIBRARIAN OF CONGRESS, SEPTEMBER 19, 1989

Statement of James H. Billington
The Librarian of Congress

September 19, 1989

Good morning. I am pleased to announce today the first installment of 25 films placed in the National Film Registry, located in the Library of Congress. Under the law as passed by Congress, 25 films are to be selected for each of the next three years -- a total of only 75 films. These films were selected after going through the 3 elements of review mandated by the legislation: the general public, the new National Film Preservation Board, and the Librarian of Congress. The general public nominated almost 1,000 film titles by mail. The distinguished members of the National Film Preservation Board then met on July 19 in Los Angeles to discuss a smaller list of films extensively among themselves. After that meeting, each member of the Board sent his or her weighted ballot of top films to the Counsel to the Film Board, who computed them into a base list of 25 films. Then, mindful of this base list as well as the suggested priorities and substantive discussion of the Board, I drew up the final list of 25 films in consultation with my own staff in the Motion Picture, Broadcasting and Recorded Sound Division. In other words, this has been a long, exhaustive process.

Make no mistake, this list of 25 films is not a list of the best 25 American films. Film critics and scholars could not agree on such a list, and the Library of Congress would not embark on any such futile exercise. This is not Academy Awards night.

This list of 25 films should suggest to the American public the breadth of great American filmmaking. Congress stated that the purpose of the Registry is to select films that are "culturally, historically, or aesthetically significant." The films named today are important to America's culture and history. It is impossible to encompass all the dimensions of great filmmaking in a list of 25 films or even in a list of 200. Because of our limited authority under the law, we are merely scratching the surface.

In future years, I will want to talk to the Film Board about considering for the list an even broader range of films to increase public awareness of the scope and diversity of American filmmaking, notably documentaries and ethnic films. We will again actively solicit the public's participation in nominating the next installment of 25 films. Indeed, you can now mail nominations to the National Film Registry in the Library of Congress for next year's list.

In accordance with Congress' wishes, I had two goals in mind in selecting the 25 national treasures announced today. First, the selection of these films should help to promote film as an art form. Second, the selection of these films should generate public interest in the preservation of film. Our great cultural heritage in film must be preserved, and we hope today to make this clear to the American people.

Let's look at the problem. Half of all of the films made before 1950 and 80 percent of the films made before 1930 have been lost forever. The cold, hard fact is that, for all their popularity in America today, films are an endangered species for the America of tomorrow. The Library of Congress film and television collection is the

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largest in the world and contains 50 percent of all films held by cinema archives in the United States and is working to protect those films that are most endangered. Our people in the Library of Congress have collected films and conducted preservation activities for over 40 years. Other film archives including the National Archives, the American Film Institute, the George Eastman House, the Museum of Modern Art, UCLA, and the University of Wisconsin Film Center have done important film preservation. Much more needs to be done, and the public's support is crucial.

Congress, in passing the Film Preservation Act last year, launched a limited experiment, 75 films over 3 years. They intended to draw attention to the need for preservation and to move preservation forward by educating the American people on certain practices used in the dissemination of films to the public.

Under the 1988 Film Preservation Act, it is now required that if copies of any of these 25 films are either colorized or materially altered, they must be labeled as such. This law does not end the current practices of colorization or alterations of films. The labeling requirements under the law will not go into effect until I issue labeling guidelines some time later this year or early in 1990. The National Film Preservation Board will meet next week to help me with the labeling requirements.

In essence then, the law is really about preserving and archiving the originals of great and important films. Unless such preservation activities are carried out, many of the films which the public enjoys today will not be available to future generations. Some of

APPENDIX 8.—FILMS SELECTED FOR THE NATIONAL FILM REGISTRY—1989

9/19

FILMS SELECTED FOR
THE NATIONAL FILM REGISTRY - 1989

1) THE BEST YEARS OF OUR LIVES (1946)

2) CASABLANCA (1942)

3) CITIZEN KANE (1941)

4) THE CROWD (1928)

5) DR. STRANGELOVE (or, HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB) (1964)

6) THE GENERAL (1927)

7) GONE WITH THE WIND (1939)

8) THE GRAPES OF WRATH (1940)

9) HIGH NOON (1952)

10) INTOLERANCE (1916)

11) THE LEARNING TREE (1969)

12) THE MALTESE FALCON (1941)

13) MR. SMITH GOES TO WASHINGTON (1939)

14) MODERN TIMES (1936)

15) NANOOK OF THE NORTH (1922)

16) ON THE WATERFRONT (1954)

17) THE SEARCHERS (1956)

18) SINGIN' IN THE RAIN (1952)

19) SNOW WHITE AND THE SEVEN DWARFS (1937)

20) SOME LIKE IT HOT (1959)

21) STAR WARS (1977)

22) SUNRISE (1927)

23) SUNSET BOULEVARD (1950)

24) VERTIGO (1958)

25) THE WIZARD OF OZ (1939)

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the films on today's list, for example, popular as they are, have never been properly archived.

Some have criticized the role of the government in a film selection process. All archivists would agree that their ideal would be to preserve all films and let the test of time decide which are the films of significance. But archives cannot afford such luxuries. The Library of Congress is the closest thing we have to a universal depository for the American memory. We strive to preserve and archive as much as possible. We welcome this particular selection process as a stimulus to all Americans to preserve what is most important to the national memory.

We expect that, as with any list of films, there will be criticism of some or all of the films selected today. We welcome public debate in the hope that it will stimulate discussion about film as art and the need for more film preservation. These films are a tribute to the American creative spirit. They deserve recognition and preservation, and their selection should draw attention to the hundreds of other films which deserve similar consideration. Next year we will nominate 25 more films, and 25 the year after that. If Congress allows the authority of the Film Preservation Act to continue after 1991, we could continue this process for years to come.

Now, let me read the list.

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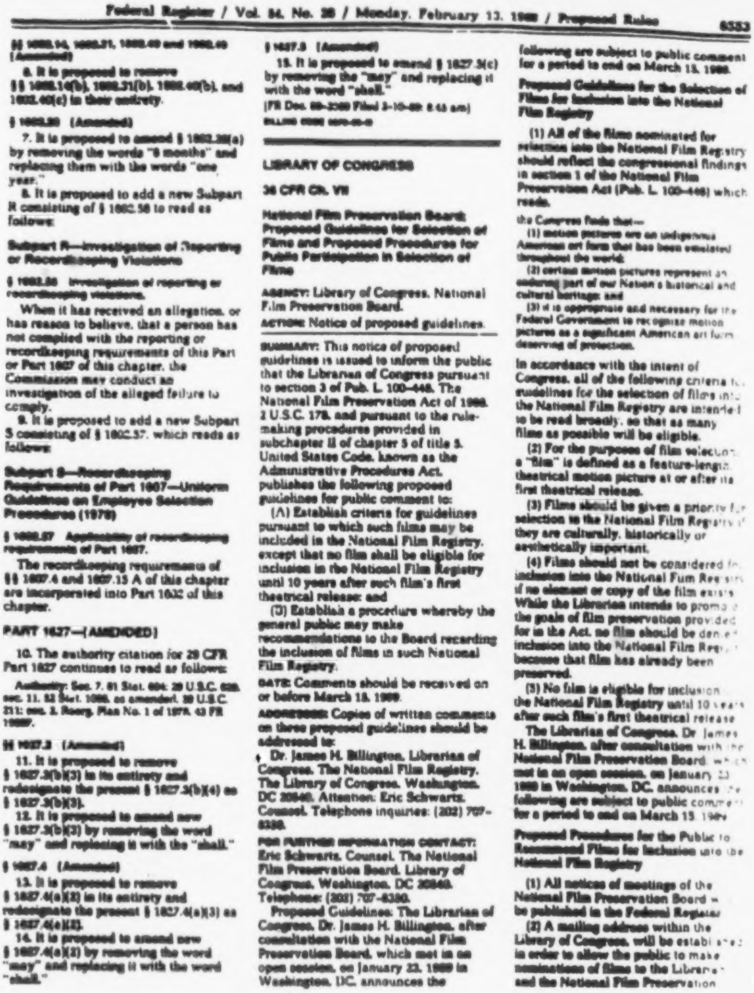
APPENDIX 10.—PROPOSED RULES, NATIONAL FILM PRESERVATION BOARD, FED. REG., VOL. 54, NO. 28, FEBRUARY 13, 1989



§§ 1602.14, 1602.21, 1602.40 and 1602.40 [Amended]

6. It is proposed to remove §§ 1602.14(b), 1602.21(b), 1602.40(b), and 1602.40(c) in their entirety.

§ 1602.20 [Amended]

7. It is proposed to amend § 1602.20(a) by removing the words "6 months" and replacing them with the words "one year."

8. It is proposed to add a new Subpart R consisting of § 1602.56 to read as follows:

Subpart R—Investigation of Reporting or Recordkeeping Violations

§ 1602.56 Investigation of reporting or recordkeeping violations.

When it has received an allegation, or has reason to believe, that a person has not complied with the reporting or recordkeeping requirements of this Part or Part 1607 of this chapter, the Commission may conduct an investigation of the alleged failure to comply.

9. It is proposed to add a new Subpart S consisting of § 1602.57, which reads as follows:

Subpart S—Recordkeeping Requirements of Part 1607—Uniform Guidelines on Employee Selection Procedures (1978)

§ 1602.57 Applicability of recordkeeping requirements of Part 1607.

The recordkeeping requirements of §§ 1607.4 and 1607.15 A of this chapter are incorporated into Part 1602 of this chapter.

PART 1627—[AMENDED]

10. The authority citation for 29 CFR Part 1627 continues to read as follows:

Authority: Sec. 7, 81 Stat. 604; 29 U.S.C. 626; sec. 11, 52 Stat. 1066, as amended, 29 U.S.C. 211; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

§ 1627.3 [Amended]

11. It is proposed to remove § 1627.3(b)(3) in its entirety and redesignate the present § 1627.3(b)(4) as § 1627.3(b)(3).

12. It is proposed to amend new § 1627.3(b)(3) by removing the word "may" and replacing it with the "shall."

§ 1627.4 [Amended]

13. It is proposed to remove § 1627.4(a)(2) in its entirety and redesignate the present § 1627.4(a)(3) as § 1627.4(a)(2).

14. It is proposed to amend new § 1627.4(a)(2) by removing the word "may" and replacing it with the word "shall."

§ 1627.5 [Amended]

15. It is proposed to amend § 1627.5(c) by removing the "may" and replacing it with the word "shall."

[FR Doc. 89-3260 Filed 2-10-89; 8:45 am]

BILLING CODE 6570-06-M

LIBRARY OF CONGRESS

36 CFR Ch. VII

National Film Preservation Board; Proposed Guidelines for Selection of Films and Proposed Procedures for Public Participation in Selection of Films

AGENCY: Library of Congress, National Film Preservation Board.

ACTION: Notice of proposed guidelines.

SUMMARY: This notice of proposed guidelines is issued to inform the public that the Librarian of Congress pursuant to section 3 of Pub. L. 100–446, The National Film Preservation Act of 1988, 2 U.S.C. 178, and pursuant to the rule-making procedures provided in subchapter II of chapter 5 of title 5, United States Code, known as the Administrative Procedures Act, publishes the following proposed guidelines for public comment to:

(A) Establish criteria for guidelines pursuant to which such films may be included in the National Film Registry, except that no film shall be eligible for inclusion in the National Film Registry until 10 years after such film's first theatrical release; and

(B) Establish a procedure whereby the general public may make recommendations to the Board regarding the inclusion of films in such National Film Registry.

DATE: Comments should be received on or before March 15, 1989.

ADDRESSES: Copies of written comments on these proposed guidelines should be addressed to:

Dr. James H. Billington, Librarian of Congress, The National Film Registry, The Library of Congress, Washington, DC 20540, Attention: Eric Schwartz, Counsel. Telephone inquiries: (202) 707-8350.

FOR FURTHER INFORMATION CONTACT: Eric Schwartz, Counsel, The National Film Preservation Board, Library of Congress, Washington, DC 20540, Telephone: (202) 707-8350.

Proposed Guidelines: The Librarian of Congress, Dr. James H. Billington, after consultation with the National Film Preservation Board, which met in an open session, on January 23, 1989 in Washington, DC, announces the following are subject to public comment for a period to end on March 15, 1989.

Proposed Guidelines for the Selection of Films for Inclusion into the National Film Registry

(1) All of the films nominated for selection into the National Film Registry should reflect the congressional findings in section 1 of the National Film Preservation Act (Pub. L. 100–446) which reads:

> the Congress finds that—
>
> (1) motion pictures are an indigenous American art form that has been emulated throughout the world;
>
> (2) certain motion pictures represent an enduring part of our Nation's historical and cultural heritage; and
>
> (3) it is appropriate and necessary for the Federal Government to recognize motion pictures as a significant American art form deserving of protection.

In accordance with the intent of Congress, all of the following criteria for guidelines for the selection of films into the National Film Registry are intended to be read broadly, so that as many films as possible will be eligible.

(2) For the purposes of film selection, a "film" is defined as a feature-length theatrical motion picture at or after its first theatrical release.

(3) Films should be given a priority for selection to the National Film Registry if they are culturally, historically or aesthetically important.

(4) Films should not be considered for inclusion into the National Film Registry if no element or copy of the film exists. While the Librarian intends to promote the goals of film preservation provided for in the Act, no film should be denied inclusion into the National Film Registry because that film has already been preserved.

(5) No film is eligible for inclusion into the National Film Registry until 10 years after such film's first theatrical release.

The Librarian of Congress, Dr. James H. Billington, after consultation with the National Film Preservation Board, which met in an open session, on January 23, 1989 in Washington, DC, announces the following are subject to public comment for a period to end on March 15, 1989.

Proposed Procedures for the Public to Recommend Films for Inclusion into the National Film Registry

(1) All notices of meetings of the National Film Preservation Board will be published in the Federal Register.

(2) A mailing address within the Library of Congress, will be established in order to allow the public to make nominations of films to the Librarian and the National Film Preservation

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APPENDIX 9.—LIST OF NATIONAL FILM PRESERVATION BOARD MEMBERS, SEPTEMBER 1989

NATIONAL FILM PRESERVATION BOARD MEMBERS
September 1989

- The Academy of Motion Picture Arts and Sciences
  - Fay Kanin, member
  - Walter Mirisch, alternate

- The Alliance of Motion Picture and Television Producers
  - J. Nicholas Counter III, member
  - Carol A. Lombardini, alternate

- The American Film Institute
  - Gene F. Jankowski, member
  - George Stevens, Jr., alternate

- The Directors Guild of America
  - Arthur Hiller, member
  - Sydney Pollack, alternate

- The Motion Picture Association of America
  - Jack Valenti, member
  - Fritz Attaway, alternate

- The National Association of Broadcasters
  - Edward O. Fritts, member
  - James C. May, alternate

- The National Society of Film Critics
  - David Kehr, member
  - Stephen Schiff, alternate

- Department of Cinema Studies in the Graduate School of Arts and Sciences, New York University
  - Charles Milne, member
  - William K. Everson, alternate

- The Screen Actors Guild of America
  - Roddy McDowall, member
  - Barry Gordon, alternate

- Society of Cinema Studies
  - John Belton, member
  - Kristin Thompson, alternate

- University Film and Video Association
  - Ben Levin, member
  - Betsy A. McLane, alternate

- Department of Theater, Film and Television, College of Fine Arts, University of California, Los Angeles
  - Robert Rosen, member
  - Howard Suber, alternate

- The Writers Guild of America (West and East)
  - George Kirgo, member
  - Edward Adler, alternate

Board. All nominations should include the film title only, unless additional information is necessary to prevent confusion with similarly named titles.

(3) Materials will be prepared for congressional offices to send information to constituents who wish to make nominations. Materials will also be made available for distribution to libraries, movie theaters, and through the guilds and societies representing actors, directors, screenwriters, producers, and film critics, film preservation organizations and representatives of academic institutions with film study programs, in order to encourage broad participation from the general public. The nominations, when received, will be forwarded to the Librarian of Congress and members of the Board to assist them in making selections of films into the National Film Registry.

(4) The Librarian of Congress will study the possibility in future years of broadcasting notices to the public on television and radio, after further review by the Board and after consulting with the broadcast industry.

(5) All nominations for inclusion of films into the National Film Registry for 1989, from whatever source, must be submitted in writing, by mail, to the Librarian of Congress *no later than April 21, 1989.* All nominations should be mailed to: National Film Registry, Library of Congress, Washington, DC 20540.

Dated: February 7, 1989

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 89-3230 Filed 2-10-89; 8:45 am]

BILLING CODE 1410-07-M

APPENDIX 11.—ANNUAL REPORT OF THE ACTIVITIES UNDER THE NATIONAL FILM PRESERVATION ACT OF 1988 FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1990

NATIONAL FILM
PRESERVATION BOARD
OF THE LIBRARY OF CONGRESS

ANNUAL REPORT OF ACTIVITIES UNDER THE NATIONAL FILM PRESERVATION ACT OF 1988 FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1990

In accordance with Public Law 100-446, the National Film Preservation Act of 1988, the Library of Congress submits this second annual report summarizing activities of the Library of Congress and the National Film Preservation Board in carrying out the provisions of the Act.

The Act established in the Library of Congress a National Film Registry for the purpose of registering and preserving films that are culturally, historically, or aesthetically significant.

The Act requires the Librarian of Congress to select, after consultation with the Board, up to twenty-five films a year for the National Film Registry. The Library then must attempt to obtain archival quality copies of each of the nominated films for inclusion in the National Film Board Collection in the Library of Congress. Finally, the Librarian is obligated to issue guidelines prescribing the kinds of "material alterations" that require labeling of the films selected for inclusion in the National Film Registry.

The films selected for inclusion in the National Film Registry for 1990 are:

(1) **All About Eve** (1950)
(2) **All Quiet on the Western Front** (1930)
(3) **Bringing Up Baby** (1938)
(4) **Dodsworth** (1936)
(5) **Duck Soup** (1933)
(6) **Fantasia** (1940)
(7) **The Freshman** ((1925)
(8) **The Godfather** (1972)
(9) **The Great Train Robbery** (1903)
(10) **Harlan County, U.S.A.** (1976)
(11) **How Green Was My Valley** (1941)
(12) **It's a Wonderful Life** (1946)

(202) 707-5214
FAX (202) 707-[illegible]
lc
[illegible]

(13) Killer of Sheep (1977)
(14) Love Me Tonight (1932)
(15) Meshes of the Afternoon (1943)
(16) Ninotchka (1939)
(17) Primary (1960)
(18) Raging Bull (1980)
(19) Rebel Without a Cause (1955)
(20) Red River (1948)
(21) The River (1937)
(22) Sullivan's Travels (1941)
(23) Top Hat (1935)
(24) The Treasure of the Sierra Madre (1948)
(25) A Woman Under the Influence (1974)

Last year the Library and the National Film Preservation Board announced two broad goals--to promote film as an art form and to generate public interest in the preservation of film. These goals were furthered by the nomination of the first twenty-five films in September 1989, which generated an enormous amount of attention in the popular and critical press. Every major newspaper and many of the major networks reported not only on the list of films but on the activities of the Library of Congress and other archives in preserving our national motion picture heritage.

This year's films, like last year's, were selected after a long and exhaustive process. The public nominated 1,465 film titles, a dramatic increase from last year's 962 titles. Nominations were received from 40 states and the District of Columbia. The National Association of Theater Owners (NATO), a trade association representing thousands of theaters nationwide, published a nomination form in its trade publication, and will repeat this in 1991.

In addition, the Librarian asked each Board member to suggest additional film historians and critics whom he could contact for advice about minority and ethnic films, documentaries and animated features that are historically, culturally, or aesthetically significant even though they may not be widely known. Nearly thirty critics responded with approximately 300 additional nominations.

The National Film Preservation Board met twice to discuss the film selections, once in February in Los Angeles to refine the film selection process, and once in July to recommend their list of twenty-five film titles for 1990.

Three changes were in made in Board membership in accordance with section 8 of the Act (the current Board membership list is attached). Arthur Hiller replaced Franklin Schaffner who died in July 1989. The members and alternates from two organizations traded places, with Charles Milne becoming the member representing New York University and Bob Rosen the member representing UCLA.

Meeting of the National Film Preservation Board
February 19, 1990

The National Film Preservation Board met at the headquarters of the Writers Guild of America in Los Angeles and was chaired by Fay Kanin, representing the Academy of Motion Picture Arts and Sciences. Eleven of the thirteen organizations represented on the Board attended the meeting as well as the Librarian of Congress.

The Board discussed and adopted a schedule for selecting films for the National Film Registry in 1990. It agreed to use the February 1989 criteria for selecting films. These criteria were published in final form in the Federal Register on August 9, 1990 (see attached).

These criteria allow as many films as possible to be eligible for selection--with broad interpretations of "theatrical release" (any exhibition in a theater including festivals and publicity showings) and "feature length" (the definition varies according to the year in which a particular film was made).

The Board discussed the Library's efforts to obtain "archival quality copies" of the first twenty-five films, and agreed to help the Library obtain the necessary preservation quality copies.

The Board discussed the role of the additional advisors and historians whose names the Librarian had requested each Board member to bring to this meeting. The Librarian agreed to send a letter to the Board's list of historians and experts asking for the names of additional films for inclusion in the National Film Registry, especially minority and ethnic films, documentaries and animated features. The Librarian also agreed to make the response letters available to all the Board members so that they could contact these film historians and advisors individually with follow-up questions, and the Librarian offered to arrange screenings of obscure titles, if possible.

To broaden the public's interest and participation in the Board's activities, the Librarian asked staff to look into the possibility of getting tear sheet ballots in theaters for the public. The possibility of a film trailer to be shown in theaters was also suggested for further review by the Librarian. [Subsequently, a meeting was held in Washington with representatives from the National Association of Theater Owners (NATO), who prepared ballots for distribution in their theaters.]

It was agreed that the Librarian, in consultation with the Board, would try to achieve a balance in the final selection process, in keeping with Congress' intent that the films selected represent the broadest range of films possible.

Meeting of the National Film Preservation Board
July 20, 1990

The National Film Preservation Board met at the Library of Congress in Washington, D.C. and was again chaired by Fay Kanin. The Librarian attended, as did twelve of the thirteen Board members. Also in attendance, at the Board's request, was a member of the American Society of Cinematographers.

Prior to the meeting, a number of Board members attended screenings of films slated for discussion. The Board was shown the seal of the National Film Registry, designed by Saul Bass. This seal, required by section 3 of the Act, is available for purchase from the Library's Motion Picture, Broadcasting and Recorded Sound Division.

The purpose of this meeting was to advise the Librarian which films to choose for the National Film Registry. To facilitate candor, the Board requested that the meeting be closed. The Board had chosen from the 1,465 film titles nominated by Board Members and alternates, the general public, and the film historian's a "working list" of 50 titles for full discussion.

The Board decided not to establish a quota for certain genres of film, such as animated features, documentaries, avant garde and independent films. They agreed that any film would be eligible, whether or not it was on anyone's list, if it met the qualification requirements set by the Board and the Librarian.

The Board discussed the films on their "working list" title by title. Every film was discussed using the criteria set out by Congress--cultural, historical, or aesthetic significance. After several hours of discussion, the Board decided to take several days to reflect on the lively discussion and make their final recommendations by mail to the Librarian of Congress.

Having benefited from the Board's discussion and their list of films, the Librarian consulted with the staff of the Library's Motion Picture, Broadcasting and Recorded Sound Division and viewed a number of films before making the final selections. On October 18, 1990 the Librarian announced the final list of twenty-five films for 1990 to the American public.

Film Labeling Guidelines

On November 30, 1989, in accordance with the Administrative Procedures Act, the Librarian of Congress published a notice of proposed guidelines for the labeling of the first twenty-five films selected for inclusion in the National Film Registry and the proposed list of those first twenty-five films.

On August 9, 1990, the Librarian of Congress issued the final regulations pursuant to section 3 of the Act. The final guidelines became effective on September 24, 1990, and expire on September 27, 1991. These guidelines will apply to the second and third lists of twenty-five films once those lists are published in the *Federal Register*. Both the proposed guidelines and the final guidelines as printed in the *Federal Register* are attached.

The Librarian received eleven public comments regarding the proposed film labeling guidelines. Although some of the comments supported the proposed guidelines overall, each of the comments proposed some modifications to the guidelines as published in the *Federal Register*.

In addition to the public comments, the Librarian also had the advice of the Board from its meeting on September 26, 1989 (summarized in last year's report to Congress). After reviewing the comments, the recommendations of the Board, and the legislative history, the Librarian issued final guidelines.

These final guidelines are to be used by film owners, distributors, exhibitors and broadcasters to determine whether a version of one of the films selected for inclusion in the National Film Registry, which is in their possession, has been colorized or otherwise materially altered and therefore must carry a label as designated in section 4 of the Act.

In addition to the use of a label, these regulations are to be used for the placement of the seal of the National Film Registry on one of the designated films. That seal can only be used for films that are *not* colorized or otherwise materially altered. The Librarian encouraged film owners, distributors and exhibitors to use the seal of the National Film Registry with some discretion because it carries the name of the Library of Congress, and he stated his preference that the seal be used on original theatrical release versions wherever possible.

The Librarian made five major changes to the proposed labeling guidelines of November 30.

First, based on information provided in the comments, he incorporated a standard of 5 percent of running time (per scene or per total running time of the film overall) for time compression or time expansion (lexiconning) into the definition of what is not a material alteration.

Second, to narrow the focus of the labeling requirements in accordance with congressional intent, an exemption was provided from labeling if materials equaling up to 5 percent of running time were removed for any reason. This allows three minutes per hour of running time to be edited out over and above any removal of materials which is necessary for community standards and practices (including nudity, profanity and explicit violence).

Third, in order to clarify the focus of the labeling requirements, practices used for good faith restoration and archiving were clearly articulated to prevent abuse of this exemption, while allowing some practices to continue without labeling, such as color corrections or good faith soundtrack restorations.

Fourth, where alternate materials shot by the original director are inserted for alternate versions, whether for community standards or for other marketing purposes (such as rereleases), the label prescribed by the Act would not serve its intended useful purpose and would not be not required.

Finally, as a result of the comments received, the exclusion for panning and scanning was changed from an objective standard based on aspect ratios to a standard based on the "reasonable" and "customary" uses within the industry.

Preservation Activities of the Library of Congress
The 1989 Film Titles

Under section 3 of the Act, the Librarian is instructed to obtain "by gift" archival quality copies of the original version of each film selected for the Registry. The Library of Congress is the largest film archive in the United States and has been preserving and restoring film for over 40 years. Even so, the

Library did not have archival quality copies of many of the films selected for inclusion in the National Film Registry.

Film preservationists and archivists are concerned with the original "preprint" materials. Only these materials, when correctly restored and maintained, can guarantee that future generations will be able to see these films as their creators intended them to be seen.

The staff of the Library began the process of obtaining archival quality materials for the first twenty-five films by researching the copyright status of each of the films. Some of the films are almost seventy-five years old and copyright ownership has changed hands many times. The staff also researched the quality and location of the best surviving materials available for each film. In some cases, the best available materials existed in many different public and private collections.

The Library contacted copyright owners and other archives to request gifts or assistance in obtaining the best surviving materials for each film. The Library received strong support from trade associations and the motion picture industry. Despite these efforts, the Library still does not have archival quality copies of all twenty-five films. But our difficulties in finding and obtaining copies even of these generally well-known and beloved films illustrates the extent of the film preservation challenge in this country and the important role the National Film Preservation Board can play in preserving this part of our cultural heritage.

APPENDIX 12.—LETTER FROM GEORGE SPIRO DIBIE, PRESIDENT, INTERNATIONAL PHOTOGRAPHERS GUILD, TO HON. WILLIAM J. HUGHES, CHAIRMAN, SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION, JUNE 7, 1991

IATSE 659

INTERNATIONAL PHOTOGRAPHERS GUILD

OF THE MOTION PICTURE AND TELEVISION INDUSTRIES LOCAL 659 IATSE

REPRESENTING
DIRECTORS OF
PHOTOGRAPHY
CINEMATOGRAPHERS
CAMERA OPERATORS
CAMERA ASSISTANTS
STILL PHOTOGRAPHERS
FILM LOADERS
ANIMATION
NEWS PHOTOJOURNALISTS
VIDEO CONTROLLERS

7 June 1991

JUN 10 1991

Honorable William J. Hughes, Chairman
Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
207 Cannon House Office Building
Washington, D.C.20515

Dear Chairman Hughes:

On behalf of the 3,000 member International Photographers Guild I would like to thank you for choosing the Guild as one of two cinematographers' organizations authorized to nominate its members to the National Film Preservation Board.

Our Guild is well qualified for this task because it is the largest organization of its kind in the world. All professional cinematographers are now, or aspire to become, members of our Guild. Indeed, nearly all members of the American Society of Cinematographers (ASC) are also members of the Guild.

The artistic achievements of Guild members are legendary in all fields of cinematography, including feature films. They have won more Oscars, Emmys, Clios and documentary awards than members of any other photographers' organization. Guild members have photographed such classics as CASABLANCA (1942), CLOSE ENCOUNTERS OF THE THIRD KIND (1977), not to mention this year's Academy Award winning DANCES WITH WOLVES. They have also been nominated for or won Emmys for WAR AND REMEMBRANCE, GROWING PAINS, MOONLIGHTING and many more. They are, in short, the world's best.

But the Guild is not a mere honorary organization. On the contrary, we are a trade union that represents our members on a host of fronts, including collective bargaining. Like the Directors Guild of America, Screen Actors Guild, Writers Guild of America, the International Photographers Guild bargains for cinematographers, camera operators, assistants, etc., in negotiations with the Alliance of Motion Picture and Television Producers (AMPTP). Indeed, for more than 60 years the Guild has been fighting to improve the wages and working conditions and to expand the artistic rights of cinematographers and camera crews.

Based on the above experience, the Guild applauds your efforts to reauthorize the National Film Preservation Act. However, the Guild is concerned that the bill's nomination procedure for the cinematographer's seat is unnecessarily divisive and perhaps counterproductive to the purpose of choosing the most qualified representative. As presently written, the bill would have two organizations, our Guild and the ASC, nominate three candidates each. The Librarian of Congress would then choose the Board member from one of the organizations' choices and the alternate to the Board from the other organization's choices.

Such a procedure has a number of potential and real flaws. First, it would pit the two organizations against each other. By mandating that each organization select three nominees, it would virtually preclude the possibility of their mutually agreeing on one set of nominees. Second, it would encourage the organizations to compete for the Librarian's favor. He, after all, would make the final choices. This, we fear, would lead to a political quagmire that may frustrate the goal of choosing the most qualified candidate. Third, it ignores the fundamental fact that nearly all of the ASC's 175 members are members of the Guild. Why should a bill divide member against member, provoking unnecessary competition? Fourth, because it sets up a false dichotomy, it runs the risk that one of these organizations would always be dissatisfied with the result, i.e., alternate status. This point would ring particularly true in our case because the Guild is more than 15 times larger than the ASC.

In order to avoid these problems, the Guild suggests that the bill be amended to read that the two organizations would "jointly represent" cinematographers on the Board. As such they would be required to agree on three nominees, one of whom the Librarian would select, for Board membership.

The Guild believes the above amendment would prevent needless political division by encouraging the organizations to work together in the best interests of cinematographers and the Board.

We thank you for the confidence you have expressed in our organization and we would like this comment placed into the record of the June 12, 1991 hearing on the Film Preservation Act. We look forward to playing an active role on the Film Preservation Board.

Sincerely,

George Spiro Dibie

George Spiro Dibie, President

GSD/m

APPENDIX 13.—LETTER FROM BARRY W. LYNN, LEGISLATIVE COUNSEL, AND MORTON H. HALPERIN, DIRECTOR, AMERICAN CIVIL LIBERTIES UNION, TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 11, 1991

AMERICAN CIVIL LIBERTIES UNION

WASHINGTON OFFICE

122 Maryland Avenue NE
Washington DC 20002
(202) 544-1681

National Headquarters
132 West 43rd Street
New York NY 10036
(212) 944-9800

Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

Eleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNCIL

June 11, 1991

Congressman William J. Hughes
Chairman, House Subcommittee on
Intellectual Property and Judicial Administration
341 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Hughes:

The American Civil Liberties Union was pleased to see that you have introduced H.R. 2372, a bill to change the 1988 legislation regarding the National Film Preservation Board. We support the bill which terminates the existing labelling requirement for copyright owners and others who distribute or exhibit "altered" versions of films selected for inclusion in the National Film Registry.

As we indicated in our filing to the Librarian of Congress at the time that regulations were proposed for implementing the Film Registry legislation, it is a form of censorship whenever agents of the United States government are required to make decisions regarding the artistic merits of works which then, as a collateral matter, imposes burdensome disclosure requirements on the dissemination of these works. We believe it is unconstitutional to require a private party to place a "label" with specific government-mandated wording on a product like motion pictures protected by the First Amendment, at least absent a genuinely "compelling" government interest. There was not, however, any record before Congress in 1988 from which to derive the conclusion that distribution or exhibition of any "colorized" or otherwise "materially altered" films was a substantial government concern. A "compelling" government interest is an extremely heavy burden to bear, and we find no basis for believing any labelling requirement would withstand constitutional muster. Moreover, selection of a particular film for inclusion in the National Film Registry certainly never carried with it the inherent need to notify every viewer when an "altered" version was exhibited.

The new legislation merely requires that the Librarian of Congress "provide a seal to indicate that a film has been included in the National Film Registry..." so that the seal "may then be used on copies of such films that are original and complete versions as they were first published...". Only where a person uses the seal is there any potential civil liability.

Your proposal, of course, eliminates most of the significant problems associated with the current statute and regulations. It would no longer be necessary for exhibitors and distributors to be concerned about whether the product they were handling was "materially altered". The pejorative message of the current labels will undoubtedly limit distribution of films which contain them. Further, it would not be necessary for the Librarian to micromanage the determination of what is and what is not a "material alteration" and what alterations, even if "material", are acceptable because they are "merely" done to comport with customary standards and practices. Such content-based decisions are inappropriate.

We believe that H.R. 2372 is a most welcome move away from the constitutional problems created by the original 1988 legislation, and appreciate your sensitivity to constitutional concern.

Sincerely,

Barry Lynn

Barry W. Lynn
Legislative Counsel

Mort

Morton H. Halperin
Director

BWL/njg

APPENDIX 14.—LETTER FROM MICHAEL R. KLIPPER AND JOHN B. GLICKSMAN, COUNSEL FOR COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY, TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 11, 1991

COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY

MICHAEL R. KLIPPER
COUNSEL

SUITE 600
2000 K STREET, N.W.
WASHINGTON, D.C. 20006-1809

TELEPHONE
(202) 429-8970

June 11, 1991

The Honorable William J. Hughes
Chairman
House Judiciary Subcommittee on
Intellectual Property and the
Administration of Justice
207 Cannon House Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The Committee for America's Copyright Committee (CACC) respectfully submits the following comments on Title III of H.R. 2372, "The National Film Preservation Act of 1991," and it asks that this statement be made part of the official hearing record on this issue.

CACC is composed of representatives of a variety of America's copyright owners and users. Its members include the creators and producers of computer software and databases, books, newspapers, magazines, sound recordings, motion pictures and other video and film products, and educational testing and training materials, as well as commercial broadcasters. A list of CACC's members is attached for your review.

In early 1989, the members of CACC joined together because of their concern over legislative efforts that threaten the constitutional goal of promoting the production and dissemination of creative works. In particular, our members are troubled about proposals that would impose so-called "moral rights" on copyright-intensive industries in this country. CACC believes that, if enacted, such proposals would adversely affect many of the traditional practices and relationships that are fundamental to the daily operation of these industries.

Since its inception, CACC has been closely monitoring developments under the National Film Preservation Act of 1988, 2 U.S.C. Sec. 178 ("the Act"), including the Librarian's efforts to implement the mandatory labeling provisions and the current efforts to revise and extend the existing statutory scheme.

Our interest in the film board issue is grounded, in large part, in the fact that the Act has strong "moral rights" underpinnings. Mr. Chairman, you alluded to this very point at the time you introduced H.R. 2372:

> The 1988 legislation was the end product of an unsuccessful effort to secure proprietary rights ["moral rights"] in films for American film directors and screen writers similar to those enjoyed by their counterparts in some European countries.

Indeed, both as a discussion draft, and as first approved by a congressional subcommittee, the Act would have directly amended the Copyright Act, leaving no doubt that the fight over its enactment was about copyright law. See Schwartz, The National Film Preservation Act of 1988: A Copyright Case Study in the Legislative Process, 36 J. Copyright Soc'y of the U.S.A. 138, 141 (1989). In addition, the main proponents of the Act, the Directors Guild of America ("DGA"), made clear at the outset, and have continued to proclaim, that the 1988 law is but a first step in DGA's quest for a full-blown federal "moral rights" law.

Moreover, at the heart of the Act's labeling provisions[1] is the concept of "material alteration" -- a concept that is central to the operation of a statutory "moral rights" regime.

---

[1] Under the Act, if a film is selected for inclusion in the National Film Registry, any version of the film that has been "colorized" or "materially altered" must carry a statutorily prescribed label indicating that it has been so adapted. See 2 U.S.C. § 178c. The Act also specifies the wording of the statutorily prescribed labels for both "colorized" and "materially altered" films. See id. Furthermore, the Act directs the Librarian of Congress to establish general guidelines for use in determining whether a particular version of a film has been "materially altered." See 2 U.S.C. § 178b.

Aside from the "moral rights" issue, CACC is interested in the film board issue because of concerns about the First Amendment implications, *and* the wisdom, of a regulatory plan that requires representatives of a federally-created entity to make content-based choices about protected First Amendment works, including such determinations as which motion pictures warrant inclusion on a National Film Registry.

Against this background, at this time we would like to share with you some brief comments on Title III of H.R. 2372.

Mr. Chairman, at the outset we would be remiss if we did not express our appreciation to you, Representative Moorhead, and, of course, the Librarian of Congress, Dr. Billington, for crafting a legislative proposal that contains a number of important provisions.

First, Title III focuses on the significant issue of film preservation. As creators and users of copyrighted works, we fully recognize the public interest in the preservation and restoration of creative materials such as motion pictures. For this reason, in the past, CACC has applauded the efforts of the Librarian and Congress aimed at better preserving and restoring motion pictures, and we reaffirm our appreciation for the commitment evinced by the bill's creators to these laudable goals.

Second, because of our aforementioned concerns regarding the mandatory labeling provisions in the Act, the decision to exclude labeling language from Title III is a very welcome one.

Third, we are appreciative of the steps you have taken in drafting H.R. 2372, Mr. Chairman, to ensure that your Subcommittee, with its extensive copyright expertise, is given a full opportunity to review this legislation. Your actions in this regard have precluded a repetition of the situation that occurred in the 100th Congress, when the original film board proposal was added as an amendment to an appropriations measure despite its obvious copyright implications.

Nonetheless, the members of CACC have significant concerns regarding the overall approach found in Title III. In sum, we believe that Title III contains certain troubling provisions that (1) are *not* essential to achieving the stated goals of preserving and restoring motion pictures, and (2) put agents of the federal government in the inappropriate position of making aesthetic and qualitative judgments regarding the contents of motion pictures.

Mr. Chairman, as you indicated in your introductory remarks on H.R. 2372, "it [Title III] is limited to matters of film preservation." Title III contains several provisions crucial to achieving that worthy goal. In particular, after completion of a study, required by Section 314 of the bill, on the current state of film preservation in the United States, the Librarian is instructed to "establish a comprehensive national film preservation program for motion pictures, in conjunction with other major film archives." Section 304(a). Obviously, the purpose of this program is to improve preservation and restoration efforts with respect to the greatest possible number of motion pictures.

In light of this goal, we submit that the provisions for the creation of a National Film Registry and the selection of 25 "classic" films per year for the Registry (the maximum number of films that can be placed on the Registry annually), are not essential to further the paramount goal of preservation. Not only are these provisions not essential but, more importantly, they perpetuate one of the key vices under current law: placing the Librarian and the members of the federally-created film board in the position of making qualitative decisions about the relative merits of various motion pictures, thereby injecting the federal government into the aesthetic aspects of the motion picture industry. Enhancing and coordinating film preservation and restoration efforts is an appropriate goal. Mandating that federal agents make such aesthetic judgments is not.

Given the foregoing, we urge that the Subcommittee consider a different approach, one that eschews creating (or, in this case continuing) another federal entity -- the National Film Preservation Board -- and that relies, instead, on the Librarian's existing powers to further the interests of film preservation. The Subcommittee should consider an approach by which the Librarian appoints an informal advisory panel to (1) work with him in devising an overall plan to better coordinate preservation and restoration efforts in the public and private sector, and (2) encourage appropriate parties to voluntarily increase their efforts in this regard. In our view, an approach along these lines is preferable to one that requires subjective decisionmaking by those vested with power by the federal government. While a modest appropriations may be necessary to enable the Librarian to carry out these functions, such a streamlined approach would not necessitate establishing the type of formal governmental machinery contemplated under Title III of H.R. 2372.

In conclusion, CACC will monitor the progress of this legislation carefully as it works its way through Congress. Given our aforementioned concerns, we strongly urge this Subcommittee to resist efforts (1) to amend the film board legislation to incorporate mandatory film labeling provisions, (2) to push through mandatory labeling legislation separate and apart from the film board extension issue, and (3) for that matter, to enact any proposals that would import "moral rights" into this country.

We hope that these comments prove helpful as your Subcommittee continues its consideration of Title III. We will, of course, be happy to elaborate on these comments if that is the Subcommittee's desire.

Sincerely,

Michael R. Klipper
Michael R. Klipper

John Glicksman
John B. Glicksman

Counsel for Committee for
America's Copyright Community

cc: Members of House Judiciary Subcommittee on Intellectual Property
and the Administration of Justice

Members Of The

COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY

1991

The American Film Marketing Association

Association of American Publishers

Association of Independent Television Stations, Inc.

Association of National Advertisers

The Dun & Bradstreet Corporation

Harcourt Brace Jovanovich, Inc.

Information Industry Association

International Communications Industries Association

Magazine Publishers of America

McGraw-Hill, Inc.

Meredith Corporation

Motion Picture Association of America

National Association of Broadcasters

Paramount Communications, Inc.

The Reader's Digest Association

Recording Industry Association of America, Inc.

Time Warner, Inc.

Times Mirror Co.

Training Media Association

Turner Broadcasting System, Inc.

APPENDIX 15.—LETTER FROM ROBERT L. MAYER, PRESIDENT AND CHIEF OPERATING OFFICER, TURNER ENTERTAINMENT CO., TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 11, 1991

TURNER ENTERTAINMENT CO.
10100 Venice Boulevard, Culver City, CA 90232

ROGER L. MAYER
President and Chief Operating Officer
(213) 558-7301
Fax (213) 558-7444

June 11, 1991

The Honorable William J. Hughes
Chairman
Intellectual Property & the
Administration of Justice Subcommittee
House Judiciary Committee
207 Cannon House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

Turner Broadcasting System, Inc. respectfully submits the following comments regarding "The National Film Preservation Act of 1991," Title III of H.R. 2372. We request that our statement be made part of the official hearing record.

Turner Broadcasting is fully committed to film preservation. We appreciate the opportunity to provide the Committee an overview of our substantial preservation efforts.

In 1986, Turner Broadcasting purchased the entire Metro-Goldwyn-Mayer "MGM" film library and the pre-1950 Warner library. This and subsequent acquisitions have brought The Turner Entertainment Company's current film library to over 3,300 feature films and over 2,000 short subjects and cartoons. Many of these were produced prior to 1951 when safety film became the standard of the industry. MGM and Turner have spent a combined thirty million dollars on preservation work. Every version of every film, every cartoon, every short subject, every trailer and every other piece of film material in our entire library has been converted, preserved and restored with the exception of approximately 35 films from the RKO library which has been in our possession only a few years. These remaining films are scheduled to be completed by the end of 1991.

MGM began conversion of unstable nitrate negatives to safety film in the early 1960s. A number of rare silent movies were among the first pictures upgraded, including LA BOHEME (1914) and THE GREEN GODDESS (1923). The MGM safety conversion included not only the relatively simple copying of black and white film to safety stock but also the more difficult and expensive modernizing of the printing facilities of 115 feature films photographed in the 3-strip Technicolor process (single strip color negatives have been used since 1953). Additionally, all

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short subjects, cartoons (again, from Technicolor), trailers, foreign language titles and all other nitrate film materials were preserved on safety stock.

By the early 1980s, MGM had merged with United Artists "UA" which had previously purchased the entire pre-1950 output of Warner Brothers. About half of the UA feature films had been converted to safety stock, and preservation efforts continued after the merger. Turner then purchased the merged MGM company and completed the unfinished conversion. Two years later, Turner exclusively licensed U.S. rights to the entire output of RKO Radio Pictures (1930-1957). Of the close to 800 features in this group, 270 had not yet been protected by conversion to safety stock. Turner continued the RKO conversion which should be completed this year.

A large film library, like the Turner library, requires a significant financial commitment to preservation. Rising laboratory work costs and film stock prices have increased the conversion cost of a black and white feature film to approximately ten thousand to twenty thousand dollars, varying with the length and condition of the nitrate material. Conversion from 3-strip Technicolor to modern single strip color costs a minimum of sixty thousand dollars.

Even after the conversion of a film library is completed, the maintenance of preserved works is an ongoing process. Preserved films are stored in controlled environments, such as a salt mine, and are checked for signs of deterioration at regularly scheduled intervals. Also, improvements in preservation technology occur. For example, several of the Technicolor pictures in the Turner library which were first converted to single strip negatives in the late 1970s are being redone to achieve higher quality. Foremost in this reconversion is GONE WITH THE WIND, finished in time for its 50th anniversary in 1989 at a cost of about two hundred and fifty thousand dollars. Turner Entertainment anticipates ongoing expenditures of at least one million dollars per year in film preservation and maintenance.

Turner Broadcasting is proud of its leadership role in film preservation. But, we are not alone in our preservation efforts. The entire entertainment industry has recognized the value of film preservation and has instituted preservation programs.

Although we support your interest in film preservation, we urge the Subcommittee to consider whether extension of the National Film Board is necessary or is the best way to encourage preservation. We join the Committee for America's Copyright Community, of which we are members, in suggesting that the Librarian use his existing powers to appoint an advisory committee to devise a film preservation strategy in cooperation with film copyright owners and other interested parties. Government efforts might be better focused on films of historical or cultural interest which are in the public domain or are, for other reasons, not being preserved rather than on the twenty-five Film Board "best film" designations which are, undoubtedly, already being preserved. We would strongly support adequate appropriations for this more flexible approach which would promote preservation without the governmentally-intrusive features of the current Film Board and of H.R. 2372.

Finally, Mr. Chairman, while we are not convinced that extension of the Film Board in its present form is the best way to advance the Library's role in film preservation, we salute the focus of H.R. 2372 on preservation rather than regulation of film distribution through mandatory labeling. Turner Broadcasting intends to continue its current policy of labeling all colorized films; however, we strongly oppose mandatory labeling requirements or other so-called "moral rights" legislation and urge the Committee not to move down that road on this or other legislation.

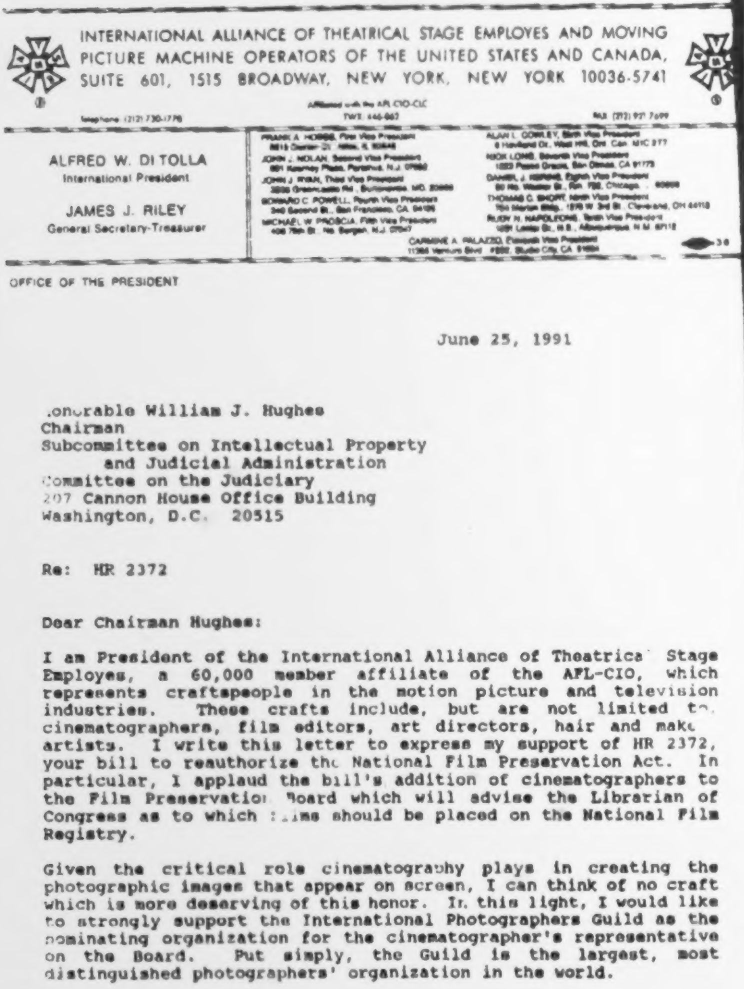
Sincerely,

Roger L. Mayer

Roger L. Mayer

RLM:ph

APPENDIX 16.—LETTER FROM ALFRED W. DI TOLLA, INTERNATIONAL PRESIDENT, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 25, 1991



INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA,
SUITE 601, 1515 BROADWAY, NEW YORK, NEW YORK 10036-5741

Affiliated with the AFL-CIO-CLC
Telephone (212) 730-1770
TWX 446-062
FAX (212) 921 7699

ALFRED W. DI TOLLA
International President

JAMES J. RILEY
General Secretary-Treasurer

FRANK A. HOBBS, First Vice President
JOHN J. NOLAN, Second Vice President
JOHN J. RYAN, Third Vice President
EDWARD C. POWELL, Fourth Vice President
MICHAEL W. PROSCIA, Fifth Vice President
ALAN L. COWLEY, Sixth Vice President
NICK LONG, Seventh Vice President
DANIEL J. KERINS, Eighth Vice President
THOMAS C. SHORT, Ninth Vice President
RUDY N. NAPOLEONE, Tenth Vice President
CARMINE A. PALAZZO, Eleventh Vice President

OFFICE OF THE PRESIDENT

June 25, 1991

Honorable William J. Hughes
Chairman
Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
207 Cannon House Office Building
Washington, D.C. 20515

Re: HR 2372

Dear Chairman Hughes:

I am President of the International Alliance of Theatrical Stage Employes, a 60,000 member affiliate of the AFL-CIO, which represents craftspeople in the motion picture and television industries. These crafts include, but are not limited to, cinematographers, film editors, art directors, hair and makeup artists. I write this letter to express my support of HR 2372, your bill to reauthorize the National Film Preservation Act. In particular, I applaud the bill's addition of cinematographers to the Film Preservation Board which will advise the Librarian of Congress as to which films should be placed on the National Film Registry.

Given the critical role cinematography plays in creating the photographic images that appear on screen, I can think of no craft which is more deserving of this honor. In this light, I would like to strongly support the International Photographers Guild as the nominating organization for the cinematographer's representative on the Board. Put simply, the Guild is the largest, most distinguished photographers' organization in the world.

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Its 3,000 plus members have won more Academy Awards and Emmys than members of any other comparable organization. Indeed, the Guild's members include almost all of the American Soci[illegible] of [illegible]atographers' 165 members. However, unlike the self-selecting ASC, the Guild's membership is not limited to cinematographers of theatrical motion pictures. On the contrary, the Guild's broadly based membership excels in all areas of photography, including documentaries, videotaping and news photojournalism. This is impo[illegible] because these are some of the very formats suggested by the [illegible]ian for nomination to the National Registry.

[illegible]r, the Guild is a trade union in the finest sense of the [illegible] For more than 60 years it has negotiated collective [illegible]ning agreements for all crafts associated with [illegible]tography, including camera operators, assistants, still photographers and news photojournalists. In this sense, the International Photographers Guild has played a role analogous to the DGA, WGA and SAG, all of whom are presently on the National [illegible] Preservation Board. In short, there should be no doubt in anyone's mind as to which cinematographic organization represents its members in all facets of its craft, as well as in collective bargaining.

I strongly urge you to make the International Photographers Guild the organization authorized to nominate cinematographers to the Film Preservation Board.

Sincerely,

Alfred W DiTolla

INTERNATIONAL PRESID[illegible]

AWD:sg
cc: Hayden Gregory

APPENDIX 17.—LETTER FROM JOHN M. KERNOCHAN, NASH PROFESSOR EMERITUS OF LAW, COLUMBIA UNIVERSITY SCHOOL OF LAW, NEW YORK, NY, TO ERIC SCHWARTZ, POLICY PLANNING ADVISER, LIBRARY OF CONGRESS, JULY 2, 1991

Columbia University in the City of New York | *New York, N.Y. 10027*
SCHOOL OF LAW
435 West 116th Street

July 2, 1991

Eric Schwartz, Esq.
Policy Planning Advisor
Department 17, Library of Congress
Washington, D.C. 20540

Dear Eric:

I found the ALAI Resolution which was sent to the Copyright Office in July 1990. I hope you will be able to get this in the Record of Proceedings for both the Senate and the House. If Bernie Korman cannot supply the CISAC resolution, I am sure it can be obtained by calling CISAC and asking for a faxed copy. The CISAC numbers in Paris are 47205937 or 47202252 and the fax number is 47230266.

With thanks and warm regards,

Sincerely,
Jack
John M. Kernochan
Nash Professor Emeritus
of Law

JMK:ah

APPENDIX 18.—LETTER FROM PROF. ANDRÉ FRANCON, SECRETARY GENERAL, ASSOCIATION LITTERAIRE ET ARTISTIQUE INTERNATIONALE, PARIS, TO RALPH OMAN, REGISTER OF COPYRIGHTS, LIBRARY OF CONGRESS, JULY 3, 1990

ASSOCIATION LITTERAIRE ET ARTISTIQUE
INTERNATIONALE

55, RUE DES MATHURINS PARIS 75008

PARIS, 3th July 1990

Hon. Ralph OMAN
Register of Copyrights for the United States
Library of Congress
Department 17
WASHINGTON, DC 20540 (U.S.A.)

Dear Mr OMAN,

I have the honor to transmit to you, on behalf of ALAI, the resolution adopted unanimously by ALAI's Executive Committee and approved by ALAI's General Assembly at its meeting in Helsinki, Finland on the 30th of May, 1990.

ALAI, as you know, is a multinational organization for the promotion and defense of authors'rights. Besides its headquarters and membership in France, ALAI includes national groups in the following nations : 17 national groups, i.e German, American, English, Austrian, Belgian, Canadian, Danish, Spanish, Finnish, French, Greek, Dutch, Italian, Norwegian, Swedish, Swiss and Israeli.

Insofar as such recording may serve to advance the proposal in question, ALAI wishes to be recorded in support of the CLIPS proposal for automatic renewal of copyright as already approved by you.

With thanks for your attention and assistance and with cordial regards.

Sincerely yours.

A.

For ALAI
Prof.André FRANÇON
Secretary General

Appendix 19.—Resolution of the Association Litteraire . Artistique International, Paris

ASSOCIATION LITTÉRAIRE ET ARTISTIQUE
INTERNATIONALE
15 RUE DES MATHURINS PARIS 75009

RESOLUTION

Considering that ALAI has long favored the Berne Convention's term of life plus fifty or more years for the protection of author's works,

and

considering that ALAI opposes -as does the Berne Convention- the invalidation of copyrights for non-compliance with formalities,

and

considering that under current U.S. Law, as applied to works in their first twenty-eight year term of protection in 1978, copyrights in such works will be invalidated if renewal formalities are not complied with,

and

considering that many important copyrights have been lost through ignorance, inadvertences or error,

Now therefore be it resolved that :

1. - ALAI supports the proposal making automatic the renewal of all copyrights for which renewal is still required under U.S. Law, which proposal has been put forward by the U.S. Committee for Literary Property Studies (CLPS), and endorsed by the U.S. Register of Copyrights and by ALAI-USA and ALAI-Canada.

.../...

2. - This resolution is to be formally communicated as soon as practicable by ALAI to the U.S. Register of Copyrights.

Adopted unanimously at Helsinki, Finland on May 30 1990 by the General Assembly of A.L.A.I.

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APPENDIX 20.—RESOLUTION OF THE INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS

INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS

BE/91/277

EXECUTIVE BUREAU
(Brussels, 28-30 January 1991)

Report

Present:

Mr J. Corbet, President
Mr G. Boytha, Vice-President

Messrs E. Bautista, also President of the European Committee, L. Capograssi, M.J. Freegard, R. Kreile, J. Matejcek, S. Matsuoka, Ms G. Messinger, Messrs G. Petri, N. Tchetverikov and J.L. Tournier, Members

The Secretary General

Apologies:

Mr A. Stampone, President of the Latin American Committee

Guest:

Mr R. Abrahams, representing the Chairman of the Asian-Pacific Committee for the discussion on item 9) of the agenda.

* * *

1) Opening of the meeting and miscellaneous announcements

The President of the Executive Bureau welcomed the members of the Bureau on behalf of SABAM.

With regard to the agenda, the following questions would be discussed under the items indicated below:

- 3bis): "SPA request to serve as a member of the "Latin America" Working Group";

- 10bis): "Possible affiliation of CISAC to the EUROVISIONI Organization";

- 10ter): "Tedis project";

- 10quater): "Memorandum from a Directorate-General of Studies (Luxembourg, 19 February 1990) on authors' rights vis-à-vis non-profit-making or similar associations".

2) Approval of the Reports of the Florence (24-25 April 1990) and Budapest (9 October 1990) meetings

Documents BE/90/1567 and BE/90/2298 were unanimously approved.

ORGANIZATION AND FUNCTIONING OF CISAC

The Executive Bureau congratulated the Secretary General on his initiative to draw up an annotated agenda, a document which certainly made the Bureau's work easier.

3) Enlargement of the "Satellites/Cable TV" Working Group to include BILD-KUNST, KODA, SUISA and SUISSIMAGE and proposed new name for it

The Bureau was unanimously in favour of enlarging the aforementioned Working Group to include BILD-KUNST, KODA and SUISA.

On the other hand, the Bureau would not take a decision on SUISSIMAGE's application until its next meeting; in the meantime, the President of the Bureau would make further inquiries about the links which might exist between this Society and AGICOA.

Lastly, the Bureau did not think the Working Group's present name should be changed.

3bis) SPA request to serve as a member of the "Latin America" Working Group

The Bureau agreed to this request and indicated that SPA would take part, as of right, in the "Latin America" Working Group's next meeting which was to be held in Mar del Plata on 25th and 26th March 1991.

4) Criteria to be adopted for awarding the CISAC Gold Medal

Rather than defining general criteria, the Bureau considered it appropriate, above all, to define minimum ones which, in any case, ought to be flexible.

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The presentation of this Medal should be a promotional act for CISAC and take place, as far as possible, at General Assemblies so that the occasion would be a formal one and would thus constitute a media event.

To ensure that this distinction remained exceptional in character, the Bureau did not think it should be awarded systematically at each Congress. Furthermore, the Medal could be awarded to authors and administrators alike.

5) Participation in meetings of the Administrative Council

For the next Administrative Council meeting, the Secretary General would prepare a draft amendment to Article 10 of the Statutes specifying that duly nominated substitutes could attend meetings only in the absence of the incumbents.

6) Resolution of the Legal and Legislation Committee (Beetsterzwaag, May 1990) on the automatic renewal of copyrights in the United States

This resolution was unanimously adopted and would be formally communicated by the Secretary General to the Register of Copyrights of the United States.

7) Organization of a Seminar on "marketing"

The Bureau thought that it might be detrimental to the Societies to employ the term "marketing" and that the title "Seminar on the licensing and communication activities of the authors' Societies" (perception et communication) would be preferable. The Secretary General would advise the organizers of the Seminar accordingly.

In addition, the Bureau agreed to CISAC bearing half the envisaged simultaneous interpretation costs, i.e. the sum of USD 5,000.

8) Report on the meetings of the Technical Committees (Athens, December 1990)

a) Share-out of cable distribution royalties between the various repertoires (CI/90/2146)

The reservations expressed by several Societies at the aforementioned Technical Committee meetings concerning the results of the "Techniques and criteria for cable distribution" Working Group's research were also shared by several members of the Bureau.

Annex

Automatic renewal of copyrights in United-States of America

Considering that CISAC has long favored the Berne Convention's term of life plus fifty or more years for the protection of author's works,

and

considering that CISAC opposes - as does the Berne Convention - the invalidation of copyrights for non-compliance with formalities,

and

considering that under current U.S. Law, as applied to works in their first twenty-eight year term of protection in 1978, copyrights in such works will be invalidated if renewal formalities are not complied with,

and

considering that many important copyrights have been lost through ignorance, inadvertences or error.

Now therefore be it resolved that:

1. On the unanimous advice of the Legal and Legislation Committee, CISAC supports the proposal making automatic the renewal of all copyrights for which renewal is still required under U.S. law, which proposal was put forward by the U.S. Committee for Literary Property Studies (CLPS), and endorsed by the U.S. Register of Copyrights and by ALAI - USA and ALAI - Canada.
2. This resolution is to be formally communicated as soon as possible by CISAC to the U.S. Register of Copyrights.

N.B. Resolution approved 5/16/90 by the CISAC Legal and Legislation Committee at Beetsterzwaag, Holland.

It still has to be submitted to the Executive Bureau or to the Administrative Council for approval

Approved by the Executive Bureau on January 28, 1991.

APPENDIX 21.—LETTER AND STATEMENT OF BARBARA RINGER, ESQ., FORMER REGISTER OF COPYRIGHTS, JUNE 27, 1991

BARBARA RINGER
ATTORNEY-AT-LAW
560 "N" STREET SOUTHWEST
SUITE N-803
WASHINGTON, D.C. 20024

(202) 488-4351
(703) 997-5807

June 27, 1991

Representative William J. Hughes
Chairman, House Subcommittee on Intellectual
Property and Judicial Administration
Room 206, Cannon House Office Building
Washington, D. C.

Dear Representative Hughes:

On June 20, 1991, Mr. Irwin Karp presented to your Subcommittee a statement favoring enactment of Title II of H.R. 2372, the Copyright Renewal Act of 1991. Mr. Karp is Counsel to the Committee for Literary Property Studies, and as a member of the Committee I fully endorse all of his statements and conclusions. In addition, I should like to present some personal observations concerning this thoroughly justified and badly needed piece of legislation, with the request that they be included in the printed record of the hearing.

Yours sincerely,

Barbara Ringer
Barbara Ringer

STATEMENT OF BARBARA RINGER, FORMER REGISTER OF COPYRIGHTS, ON TITLE II OF H.R. 2372, THE BILL FOR AUTOMATIC RENEWAL OF COPYRIGHT

June 27, 1991

I am a member of the Committee for Literary Property Studies ("CLPS"), and my views on the bill for automatic copyright renewal are fully reflected in the statement submitted to your Subcommittee by Mr. Irwin Karp, the Committee's counsel. In addition, however, I have a personal perspective on the problems addressed by this bill which I hope will prove of value to your members during further consideration of its provisions.

For five years (1951 - 1956) I was the Head of the Renewal and Assignment Section of the Copyright Office's Examining Division, and for some years thereafter, as Assistant Chief and Chief of that Division, I continued to have line authority over the Office's renewal operation. In the late 1950's I prepared an exhaustive study of the copyright law's renewal provisions, which was published in the early 1960's as a monograph in the Office's series of general revision studies. Beginning in 1955 and until my retirement in 1980 I was in close contact with the development, enactment, and implementation of what became the Act of October 19, 1976 for Geneeral Revision of the Copyright Law, and was directly involved in the drafting of the provisions on duration, renewal, and reversion. It should not be surprising that, after forty years of experience with this subject, I should have some strong feelings about it.

As I write this statement I have a mental image of my office in the old Copyright Office on the first floor of what is now the Adams Building of the Library of Congress, and of the constant procession of tragedies that were played out there. Some of these tragedies were revealed in correspondence: renewal applications received too late or inquiries (some from Congressional offices) about what to do now that the first term had expired. Worse were the frantic phone calls; if there was still any time left in the 28th year it was the Office's policy to move heaven and earth to get the renewal registered in time, but for claims received too late the pain we felt in conveying this message was nothing compared to the reaction on the other end of the line.

Worst of all were the personal visits from authors and their heirs whose property had been lost through no fault of their own. I have read the statement of Mrs. Jacqueline Byrd and was deeply moved by her experience, but I can only say that it is in no way untypical. When individual claimants break down in tears at what you have to tell them, it is not something that you can easily forget. Those of us who had to administer this unjust law, including Abraham L. Kaminstein (then Chief of the Examining Division), felt strongly enough to discuss the possibility of notifying claimants of the renewal deadlines applicable to their works, but we had to conclude that the immensity, complexity, and expense of such an undertaking would make it wholly impracticable.

The reasons for a "too late" rejection varied: often there was simply no knowledge that such a requirement existed, or there was the all-too-common procrastination involved in undertaking to deal with government red tape. A great many authors or their heirs assumed that their original publishers or producers would take care of the matter, but during an era of corporate mergers, mass transfers of copyright ownership, and dazzling changes in the media and their control, compliance with a formality connected with a 28-year old work could easily get lost in the shuffle. Even where the original publisher or other original copyright owner had established a procedure for submitting timely renewal applications on behalf of their authors, there were frequent slip-ups: misfiled tickler cards, changes in personnel, mistakes and negligence of all kinds. As for potential renewal claimants from other countries, their total ignorance of the requirement was matched by their total amazement when it was explained to them.

None of this made sense to those of us who had to deal with renewal registration on a daily basis. Early in the revision program, when we were still talking about a copyright term based on the date of publication, there were some discussions of retaining renewal and providing grace periods, advance notices, or some kind of recourse against unjust forfeitures, but none of the suggestions seemed practicable or adequate. Based on a great deal of dismal experience it was ultimately the Office's conclusion that the renewal system was truly unjust to authors and their families, that any benefits it might have were not to the public but to potential pirates looking for a windfall, that a term of either 28 or 56 years was too short, and that, for the future, the whole renewal apparatus ought to be abandoned.

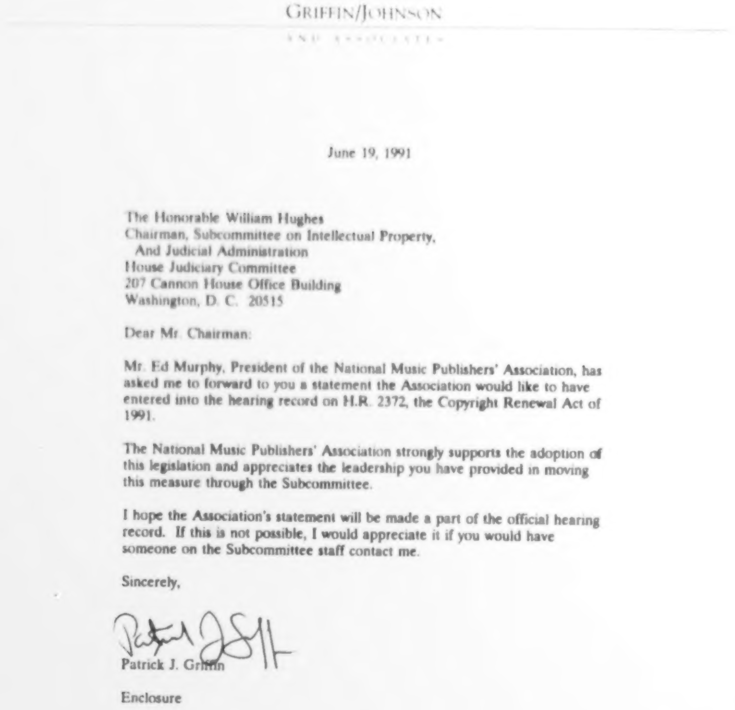
At the same time, it was considered important to retain the reversionary aspect of renewal. After a long wrangle, what emerged in the General Revision Act of 1976 was essentially a single term based on the life of the author, with a provision allowing the author or the author's family to reclaim copyright ownership after a period of time.

This left the question of what to do with subsisting copyrights still in their first term when the new law came into effect. The legislative history of the 1976 Act will bear me out in saying that this problem received very short shrift. Everyone agreed that the new law could not fairly, or even constitutionally, cut off future interests and expectancies that had been the subject of thousands of assignments, which in turn had been the subject of massive trafficking. The wording of the renewal provision had been interpreted in dozens of cases over more than sixty years, and no one dissented from the argument that, for subsisting copyrights in their first term, it would be dangerous to tinker with the old language, bad as it was.

The House Report strongly criticized the unfairness of the all-or-nothing renewal requirement, and recommended that it be repealed for the future. The same arguments applied to copyrights still in their first term, and it would have been far better if a way could have been sought at that time to ameliorate their situation. In the context of the general revision legislation there were raging arguments over the future length of the copyright term and the conditions for reversion of rights, but no one seemed disposed to focus on what was regarded as a transitional provision. No one, including me, had the imagination to suggest the rather simple solution contained in the bill now before you. There was certainly no understanding, tacit or otherwise, that the rigid renewal requirement had to be retained intact. The possibility of making renewal registration optional was, to the best of my recollection, never raised.

The 1976 statute did away with some copyright formalities and softened others, but retained certain requirements as a condition of securing and maintaining protection. The "transitional" renewal requirement for works in their first term on January 1, 1976 was one more formality, along with various notice, registration, and manufacturing provisions, and attracted no attention until the efforts to bring the United States into the Berne Convention began some ten years later. The Berne implementing legislation was highly controversial; and again there was apparently a disposition among its sponsors not to tinker with what might still be called a "transitional" provision. However, because the Berne implementing legislation finally did away with all formalities going to the life or death of a copyright except renewal registration, it now stands out like a blue carbuncle. Aside from producing human tragedies like those I have seen with my own eyes, it is fundamentally inconsistent with the basic provisions of our copyright law as it exists today.

APPENDIX 22.—LETTER FROM PATRICK J. GRIFFIN, GRIFFIN/JOHNSON AND ASSOCIATES, TO HON. WILLIAM J. HUGHES, CHAIRMAN, TRANSMITTING A STATEMENT OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC., JUNE 19, 1991



GRIFFIN/JOHNSON
AND ASSOCIATES

June 19, 1991

The Honorable William Hughes
Chairman, Subcommittee on Intellectual Property,
And Judicial Administration
House Judiciary Committee
207 Cannon House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

Mr. Ed Murphy, President of the National Music Publishers' Association, has asked me to forward to you a statement the Association would like to have entered into the hearing record on H.R. 2372, the Copyright Renewal Act of 1991.

The National Music Publishers' Association strongly supports the adoption of this legislation and appreciates the leadership you have provided in moving this measure through the Subcommittee.

I hope the Association's statement will be made a part of the official hearing record. If this is not possible, I would appreciate it if you would have someone on the Subcommittee staff contact me.

Sincerely,

Patrick J. Griffin

Enclosure

National Music Publishers' Association • Inc.

205 EAST 42 STREET, NEW YORK, N.Y. 10017 • (212) 370-5330 • CABLE ADDRESS: HAFOX
TELEX: 237441 HAFOX UR

H. R. 2372
Statement of the National Music Publishers' Association, Inc.
Before the Subcommittee On Intellectual Property and Judicial Administration
House Judiciary Committee
102nd Congress, First Session
June 20, 1991

Mr. Chairman, the National Music Publishers' Association, Inc. (NMPA) welcomes this opportunity to submit a statement in support of Title II of H.R. 2372, the Copyright Renewal Act of 1991, which is the subject of hearings today. NMPA is extremely grateful to you, Mr. Chairman, and to Mr. Moorhead for taking the lead in introducing this important legislation.

NMPA is the trade association for the American music publishing industry. We represent more than four hundred music publisher members, including virtually all of the most active and influential music copyright owners in the United States. Through their partnerships with composers and songwriters, our music publisher members help to cultivate and market the music which has made this country the most economically and culturally successful music producer in the world.

The Copyright Renewal Act of 1991 will mitigate the unfairly harsh, confiscatory effects on creators and copyright owners of failing to satisfy the copyright renewal technicalities of the 1909 Copyright Act. The proposed legislation provides for automatic renewal of pre-1978 copyrighted works published under the 1909 Act at the end of their first twenty-eight year term of protection. Thus, accidental and sometimes catastrophic forfeitures of copyrights eligible for renewal between 1991 and 2005 will be avoided. Renewal of post-1978 works is not required under the new 1976 Copyright Act.

The American intellectual property community would greatly benefit from elimination of the danger of inadvertent lapsing of pre-1978 works into the public domain due to a technical failure of the creator or copyright owner to properly file for renewal. The well known hit song from the 1950's entitled, "Rockin Robin" is just one example among thousands of copyrighted works unintentionally forfeited by innocent and unsophisticated owners.

In the case of "Rockin Robin," the widow of the songwriter, unaware of the technicalities of the 1909 copyright provisions governing the rights in her only valuable asset, failed to properly renew and was subject to the draconian penalty of divestiture. This tragically unfair result benefits no one.

In actuality, The Copyright Renewal Act of 1991 will help keep works available to the public. The diminished commercial value to merchants of dealing in public domain materials on a necessarily non-exclusive basis often discourages the manufacture and distribution of such works. This often results in the public having *less* access to works after their copyright protection expires. The premature passing of works into the public domain clearly does not represent a windfall gain for the public in any real sense.

Since The Copyright Renewal Act of 1991 also contains significant incentives for copyright owners to continue to formally renewal pre-1978 copyrights with the U.S. Copyright Office, NMPA sees no cogent arguments against its enactment. Copyright Register Ralph Oman supports "fast track" legislative action on this bill, a position which has our firm support.

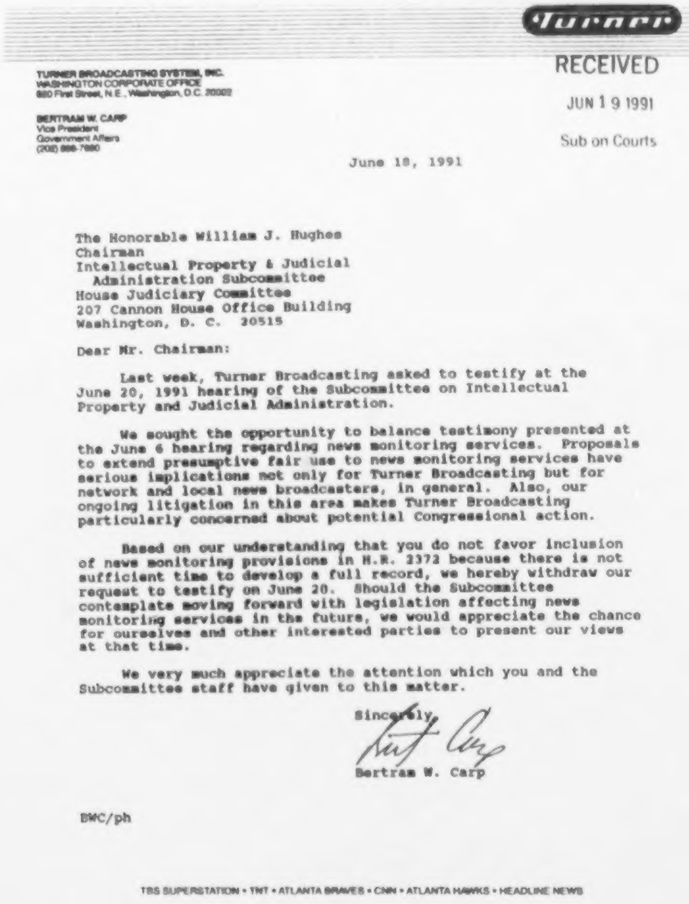
In conclusion, Mr. Chairman, Congress acted in 1976 to ensure copyright protection to all new works for a minimum of fifty years after the last surviving author's death. In 1988, Congress affirmed the role of our nation as a leader of the world copyright community by enacting the Berne Convention Implementation Act. There is insightful recognition in our country today of the importance to our economy, trade balance, and cultural legacy of strong copyright protections for creative works both at home and throughout the world.

A situation continues to exist, however, whereby certain pre-1978 works accidentally and quite unfairly have their U.S. protection revoked after twenty-eight years--to no one's benefit. NMPA urges that Congress rectify this unfortunate anomaly in the Copyright Law before one more creator or copyright owner loses protection of his or her most valued asset for failure to comply with statutory technicalities established during an era of diminished sensitivity to the importance of intellectual property rights.

Thank you.

BEST COPY AVAILABLE

APPENDIX 23.—LETTER FROM BERTRAM W. CARP, TURNER BROADCASTING SYSTEM, INC., TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 18, 1991



Turner

TURNER BROADCASTING SYSTEM, INC.
WASHINGTON CORPORATE OFFICE
820 First Street, N.E., Washington, D.C. 20002

BERTRAM W. CARP
Vice President
Government Affairs
(202) 898-7680

RECEIVED
JUN 19 1991
Sub on Courts

June 18, 1991

The Honorable William J. Hughes
Chairman
Intellectual Property & Judicial
  Administration Subcommittee
House Judiciary Committee
207 Cannon House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

Last week, Turner Broadcasting asked to testify at the June 20, 1991 hearing of the Subcommittee on Intellectual Property and Judicial Administration.

We sought the opportunity to balance testimony presented at the June 6 hearing regarding news monitoring services. Proposals to extend presumptive fair use to news monitoring services have serious implications not only for Turner Broadcasting but for network and local news broadcasters, in general. Also, our ongoing litigation in this area makes Turner Broadcasting particularly concerned about potential Congressional action.

Based on our understanding that you do not favor inclusion of news monitoring provisions in H.R. 2372 because there is not sufficient time to develop a full record, we hereby withdraw our request to testify on June 20. Should the Subcommittee contemplate moving forward with legislation affecting news monitoring services in the future, we would appreciate the chance for ourselves and other interested parties to present our views at that time.

We very much appreciate the attention which you and the Subcommittee staff have given to this matter.

Sincerely,

Bert Carp

Bertram W. Carp

BWC/ph

TBS SUPERSTATION • TNT • ATLANTA BRAVES • CNN • ATLANTA HAWKS • HEADLINE NEWS

APPENDIX 24.—STATEMENT OF JOSEPH CAYRE, PRESIDENT, GOODTIMES HOME VIDEO CORP., NEW YORK, NY

STATEMENT OF JOSEPH CAYRE ON TITLE II OF HR 2372 SUBMITTED TO SUBCOMMITTEE ON INTELLECTUAL PROPERTY JUDICIAL ADMINISTRATION OF THE HOUSE COMMITTEE ON THE JUDICIARY

I am president of GoodTimes Home Video Corporation of New York, New York. GoodTimes Home Video is now the largest independent distributor of home video cassettes in the United States. Our products appear in most major retail chains, including K-Mart, Wal-Mart, Toys "R" Us and Target Stores.

The success of our company, and the extent of the distribution of our products, is primarily due to one major fact: the retail price of our home video cassettes, usually below $10.00, is affordable for almost everyone. By pursuing this low cost strategy, GoodTimes has allowed millions of American consumers to own, rather than simply rent, home video cassettes.

Much of our product line consists of copyrighted motion pictures licensed from the major studios and other entertainment companies. Currently, GoodTimes is distributing works licensed by RCA/Columbia, MCA (Universal), HBO, Hanna/Barbera and the National Broadcasting Company, among others. GoodTimes is scrupulous in obtaining licenses to use works which are protected by existing copyrights.

Another significant part of our product line consists of works which are not protected by copyright, and which GoodTimes, like anyone else, has the right to reproduce and sell. During the past few years alone, GoodTimes has released to the public for purchase, at low cost, hundreds of public domain motion pictures, documentary compilations, shorts and cartoons which had lain dormant and inaccessible to the public. Examples of these works are the original "Phantom of the Opera" with Lon Chaney, the original, silent "Dr. Jekyll and Mr. Hyde," "Metropolis," and many Charlie Chaplin and Alfred Hitchcock films.

GoodTimes is not alone in this business. Indeed, there are literally hundreds of companies throughout the United States which produce and sell public domain home videos. Competition in this market is vigorous and prices to the consumer are correspondingly low.

One may wonder why, if GoodTimes and others can develop a market in these motion pictures, the copyright owners themselves do not exploit them during the term of copyright. The answer lies in the realities of the motion picture business. Quite simply, its orientation is towards new products, and towards those few older products whose pre-existing reputation allows them to be marketed easily. The result is that thousands of works which have been forgotten by motion picture studios, and which are of no interest to them, remain inaccessible to the public.

One example is "This Is the Army", a wonderful 1943 Technicolor musical starring Ronald Reagan and George Murphy. After its initial release by Warner Brothers, the studio never rereleased it or permitted its exploitation in any way. Its copyright was not renewed. After it fell into the public domain, home video companies like ours found it, recognized its historical interest and commercial potential, and distributed it to the public. I am confident that had the automatic renewal provisions been in place, this motion picture would still be inaccessible to the public.

The burden of renewing a copyright on a company like Warner Brothers is minimal. If such a copyright owner has so little interest in a work that it fails to file a simple renewal form, there is no injustice in letting the work become part of the public domain and available to all.

Another example is It's A Wonderful Life, which is cited by the motion picture community as an example of a tragic loss of copyright protection due to failure to renew. I believe that this case illustrates our own point. It's A Wonderful Life had little commercial success at the time of its release, and was of insufficient commercial interest to warrant renewal. Upon expiration of the copyright due to failure to renew, independent home video distributors who recognized its value began its distribution. By having entered the public domain, It's A Wonderful Life has enriched the lives of millions of American citizens who otherwise would have been unlikely to see it.

Injection of forgotten films into the public domain enables collectors and archivists to restore and reassemble motion pictures and television programs which have been literally lost by their copyright owners. For example, GoodTimes has recently released "lost" episodes of Lucille Ball and Red Skelton television programs on which copyrights had not been renewed. These episodes had been in the hands of collectors who, upon expiration of the copyrights, had an economic incentive to restore them. Automatic renewal would have consigned these works to obscurity for another 47 years.

GoodTimes Home Video recognizes and understands the problems of individual authors and composers whose rights are cut off due to an inadvertent failure to renew. We agree with the statements of Representative Hughes and the witnesses at the hearing on June 20, 1991 which reflected concern for the individuals whose widows and heirs are adversely affected by failure to observe the technical requirements for renewal. We do not oppose HR 2372 as it applies to such individual authors.

However, it is our view that these policy considerations simply do not apply in the case of composite works, works copyrighted by a corporate body, or by an employer for whom the work was made for hire. In all of these cases, copyright renewal must be effectuated not by the author, but by the "proprietor" of the work. Invariably these proprietors are corporations or persons whose businesses are oriented to the production and protection of copyrighted works.

We propose that a balance be struck between the legitimate needs of individual authors and composers on the one hand, and the interest of the public in enjoying works which have been long forgotten by corporate copyright owners on the other. Accordingly, we propose an amendment to H.R. 2372 which would require an affirmative renewal of copyright only for works enumerated in proposed amended Section 304(a)(1)(B) (i.e., posthumous works, composite works, works copyrighted by a corporate body otherwise than as assignee or licensee, and works made for hire, hereafter referred to collectively as "Paragraph 1(B) Works.") Automatic renewal for all other works would be left intact.

Different treatment of renewal for Paragraph 1(B) Works is further justified by the fact that the practical need for renewal registrations on these works is greater. It has already been noted by others that there is a public benefit to having renewal registration, namely, making it easier for persons desiring to acquire or obtain a license under a copyright to know whom to ask for these rights. In the case of works created by individual authors, the renewal right belongs to the author or his heirs, making it fairly easy to determine whom to approach. However, the renewal right for Paragraph 1(B) Works belongs to "the person or entity that was the proprietor of the copyright as of the last day of the original term of copyright."

Determining who this is 28 years after publication is no easy task. Copyrights in motion pictures are often transferred and licensed many times during the decades after publication. It is very often the case that the "proprietor" of the copyright 28 years after publication may be far removed from the initial copyright holder, and that the original copyright registrant has no idea as to who presently owns the rights. Without a renewal registration, we don't know who to contact to inquire about the possibility of obtaining a license for home video distribution. The result is that motion pictures that could otherwise be available to the public lie unexploited.

In our view, renewal registration benefits copyright owners. With registration, owners increase their chances of being contacted by those seeking licenses for the work. At the same time, the renewal system releases to the public domain those works which are no longer of commercial interest to the corporate proprietors.

We find a second troubling aspect to Title II of HR 2372 as drafted. It is not clear from the text of the bill that a work will have to have been registered in its first term of copyright protection in order to qualify for an automatic renewal. To permit automatic renewal of a work which was never registered will create an effective term of 75 years from publication, without any requirement of registration. This would create a retroactive effect to the legislation which may not be intended by the drafters. Accordingly, the attached proposed amendment codifies the requirement of a first-term registration as a prerequisite to renewal of all works.

We appreciate the opportunity to be heard on this issue. I hope that the subcommittee will consider our comments and incorporate our proposal into H.R. 2372.

3791/87463
(AB/26)

PROPOSED AMENDMENT TO HR 2372

-- In the proposed amended §304(a)(1)(B), add at the end of that subparagraph "but only if the copyright was registered during the first term."

-- In the proposed amended §304(a)(1)(C), add at the end of that subparagraph "but only if the copyright was registered during the first term."

-- Delete the proposed amendment to 17 U.S.C. §304(a)(2)(A) and substitute the following therefor:

> (2)(A) At the expiration of the original term of copyright in a work specified in paragraph 1(B) of this subsection, the copyright shall endure for a renewed and extended further term of 47 years, only if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, by the proprietor of the copyright who is entitled to claim renewal at the time the application is made, and the claim is registered.

-- In the proposed amended §304(a)(3)(A)(ii), delete, in the third line therein, "(A) or."

-- In the proposed amended §304(a)(3)(B), add, at the beginning thereof: "With respect to works specified in paragraph 1(C) of this subsection..."

-- In the proposed amended §304(a)(4)(A), line 2, add the following words after "work": "specified in paragraph 1(C) of this subsection."

(AB/26)

Appendix 25.—Letter From Jack Golodner, President, Department for Professional Employees, AFL-CIO, to Hon. William J. Hughes, Chairman, Subcommittee on Intellectual Property and Judicial Administration, June 25, 1991

Department for Professional Employees, AFL-CIO
815 16th Street, N.W., Washington, D.C. 20006 Phone 202/638-0320

June 25, 1991

Honorable William J. Hughes
Chairman, Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
207 Cannon House Office Building
Washington, D.C. 20515

Re: HR 2372

Dear Chairman Hughes:

I strongly support the addition of a cinematographer seat to the National Film Preservation Board, as contemplated in H.R. 2372, and endorse the International Photographers Guild for that seat. The Guild, through its parent organization, the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada (IATSE), is an affiliate of this Department which comprises 28 national and international union organizations representing approximately three million professional and highly trained technical workers employed in the arts, sciences and professions. The Department is the largest interdisciplinary organization of such people in the nation.

In our view, the International Photographers Guild is eminently suited to nominate cinematographers to the National Film Preservation Board because of its size--it represents more than 3000 members as opposed to the 165 members of the American Society of Cinematographers (ASC)--and because it is a union, thus accountable by law to its members. Most, though not all, members of the ASC are also Guild members.

HR 2372
page 2

Should the Guild not be involved in nominating a cinematographer to the Board, it is possible that an ASC member would be nominated to the Board who is not a member of the Guild. Such a result would be a disservice to the major organization of cinematographers in the U.S. as well as to the Board.

Thank you very much for your consideration of this matter.

Sincerely,

Jack Golodner
President

cc: Hayden Gregory

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